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MINING REPORTS

VOL. XIX.

WATERLOO MINING CO. v. BARTLETT DOE ET AL. EXECUTORS.

(82 Federal 45. Circuit Court of Appeals, Ninth Circuit. June 7, 1897.)

Equity jurisdiction to preserve property. When complainant seeks to enjoin a continuous and destructive trespass equity has jurisdiction to preserve the property till the title is settled at law.

[1]**Waiver of right to jury trial.** But if the defendant sets up a hostile title and allows the issue of title to be decided by the court as a court of chancery, it is too late in the appellate court to raise the objection that there was no jurisdiction below.

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[1]*Derry* v. *Ross*, 1 M. R. 1.

A court of equity has the right to enjoin to preserve the property and properly no further jurisdiction where the facts make ejectment the proper remedy. But if the defendant tender an issue on title to the chancellor he waives his right to trial at law. This is the holding in the text case and it is well supported. There are cases which hold that if equity has jurisdiction to enjoin (a mere incident to the litigation) it has jurisdiction to try the whole case including the title, the main controversy. *Cons. Wyoming Co.* v. *Champion Co.* 18 M. R. 113.

But such decisions cannot be reconciled with the text case nor with the almost invariable rule in the Federal Courts, nor with the constitution of any state which purports to assert the right of trial

[2]**Original end lines not parallel.** Where the description in the patent shows the claim to have parallel end lines, the fact that the original location did not have such parallel end lines will not affect the right to follow the vein on the dip, which belongs to all lode claims having parallel end lines.

Findings below not binding on appeal in chancery case. On an appeal in equity, findings of fact made by the court below are entitled to some weight, but are not binding on the appellate court. The whole case is before the latter court, and it is bound to decide the same, so far as it is in a condition to be decided, on its merits.

[3]**Narrow veins in broad zone.** Where two veins or ore bodies, lying near together in country rock of liparite, each had clearly-defined foot and hanging walls, with the usual characteristics of lodes or veins: *Held*, on the evidence, that they were separate lodes or veins, and could not be considered as constituting, with the mass of liparite between them, a single mineralized zone or lode, though the intervening liparite was more broken up than that lying outside, and to some extent impregnated with silver.

[4]**Lode leaving and returning to side line.** If the apex of a vein, or part of it, enters the end line of a claim, and then passes out through, a side line, but curves back again into the claim and crosses its other end line, this gives the owners of the claim no right to any part of the apex which is outside of their lines.

Appeal from the Circuit Court of the United States for the Southern District of California.

A. H. RICKETS and GEO. H. NOYES, for appellant.

JOHN GARBER, for appellees.

Before GILBERT, Circuit Judge, and KNOWLES and BELLINGER, District Judges.

by jury. *U. S. M. Co.* v. *Lawson*, 115 Fed. 1005. *St. Louis Co.* v. *Montana Co.* 17 M. R. 658. *Stevens* v. *Williams*, 5 M. R. 449. *Erskine* v. *Forest Oil Co.* 18 M. R. 297. *Tecumseh Co.* v. *Camp*, 17 M. R. 388. *Heyward* v. *Farmers M. Co.* 42 S. C. 136; 19 S. E. 963.

[2]*Doe* v. *Sanger*, 17 M. R. 298.

[3]*Hayes* v. *Lavagnino*, 19 M. R. 485.

[4]"Slight deviations of the outcropping lode from the location of the claim would probably not affect the right of the locator to appropriate the continuous vein." *Flagstaff Co.* v. *Tarbet*, 9 M. R. 613.

KNOWLES, District Judge. This is an action brought by John S. Doe to restrain and enjoin the appellant from committing a continuing trespass upon two mining claims, known as the "Oriental No. 2" and the "Red Cloud," situate in Calico mining district, San Bernardino county, Cal. John S. Doe died, and the appellees, Bartlett Doe and Charles F. Doe, were appointed executors of his last will and testament, and were substituted as parties plaintiff in the place of the said John S. Doe. The appellant, the Waterloo Mining Company, owns the Silver King mining claim. This lies north of and adjoining the said Oriental No. 2 and Red Cloud claims. The appellant sunk a shaft or incline upon its own surface ground within the lines of its claim, and from thence drifted into the ground claimed by appellees, and which ground is beneath the surface of that which is within the line of appellee's claims. This the appellant claims the right to do, and threatens and undoubtedly intends to continue to do, and to extract the ore therein and appropriate the same to its own use. There is a vein of spar, carrying silver and other minerals, in the Silver King lode claim, called the "north vein," and another sometimes called a "divergent vein," and at other times the "middle vein." There is a vein of spar, also carrying silver, which crops out on the Red Cloud and Oriental No. 2, and which in the evidence is termed the "south vein." Appellant claims that all these veins belong to a mineralized zone whose apex is in the Silver King ground. The Silver King is higher up the mountain than the Red Cloud and Oriental No. 2 claims, and hence upon a higher elevation than the other two. If the ground embracing these three veins is one mineral zone, then the part thereof within the Silver King premises would have the higher elevation. This zone would, however, be cut by the south side line of the Silver King and the north side lines of the Red Cloud and Oriental No. 2. Appellant received pending this suit a patent from the United States to the Silver

King lode. The appellees have certificates of sale from the United States for their two claims.

Before proceeding to discuss the questions involving more or less the merits of this controversy, one of a preliminary nature is presented for determination, and one involving the jurisdiction of the lower court to hear and enter a decree in the same. It is urged that the circuit court and that this court, in accordance with the established rules in equitable proceedings, had no right or jurisdiction to enter any decree in this case. The ground upon which this claim is based is that the bill of complaint does not present an equitable cause, for the reason that it does not appear that the title of the complainants to the premises described in their bill, and upon which it is alleged appellant has trespassed, has ever been established by any action at law, and that the title complainants alleged to be in them was controverted and denied in the answer of appellant. Hence one of the issues in the case involved the determination as to the legal title to complainants' alleged mining claims; that under such issues the action was more in the nature of an action of ejectment to try a legal title than one to determine equitable rights. It does not appear to be controverted but that appellant by its answer put in issue the legal title complainants allege in the bill to be in them. There is no doubt but this is an action asking for equitable relief. Enough is stated in the bill to have warranted the issuing of an injunction pendente lite, had an action at law existed to recover possession of said premises within the boundaries of appellees' mining claims, or in an action in trespass. The prayer in the bill is for an injunction pending this action, and also that at the determination of this action said injunction be made perpetual. There is no dispute in the case upon the point that appellant has entered upon premises beneath the surface of the two claims set forth in the bill as the property of appellees. While the answer to the bill presents an issue as to the title

of appellees to their two claims, there was no controversy in the evidence upon this point. The point presented in this case upon this matter in this court was not presented or considered in the court below. In the case of *Erhardt* v. *Boaro,* 113 U. S. 537, 538, 5 Sup. Ct. 565, 566, the supreme court, having stated that the former doctrine was that when there was a dispute as to title no injunction would be granted restraining a trespass, said:

"This doctrine has been greatly modified in modern times, and it is now a common practice, in causes where irremediable mischief is being done or threatened, going to the destruction of the substance of the estate, such as extracting ores from a mine, or the cutting down of timber, or the removal of coal, to issue an injunction, though the title to the premises be in litigation. The authority of the court is exercised in such cases, through its preventive writ, to preserve the property pending legal proceedings for the determination of the title."

Where there is no dispute as to title, there would seem to be no necessity of resorting to an action at law for the purpose of determining the same. But, when there is a dispute as to the legal title, it would seem that the best rule was to require an action at law to settle the legal title. This was so stated in the case of *St. Louis M. & M. Co.* v. *Montana M. Co.,* 58 Fed. 129. Pending this action, however, an injunction pendente lite would be proper. When the legal title is settled, if the equitable rights such as would warrant a perpetual injunction should be found for complainants, then such an injunction should be awarded. The allegations in the bill were sufficient to warrant the court in issuing, not only a temporary injunction in this case, pending an action at law to determine the legal title, but also were sufficient to warrant a perpetual injunction upon the determination of the legal title in favor of the complainants. The question is then presented as to whether or not the appellant could waive this right to have the legal title established at law before there was any consideration of the issues that presented the

question as to whether a permanent injunction should issue. If the fact that the legal title has not been determined is one of such vital importance to the jurisdiction of the court that when it exists no jurisdiction to hear and determine such a case as this can be properly exercised, then, upon the motion of appellant, or perhaps upon the court's own motion, the cause should be dismissed. In the discussion of this question, Mr. Pomeroy, in his work on Equity Jurisprudence, says:

"Where, however, the plaintiff's title is disputed, the rule is settled that he must, in general, procure his title to be satisfactorily determined, by at least one verdict in his own favor, by at least one successful trial at law, before a court of equity will interfere; but the rule no longer requires any particular number of actions or trials. The reason for this requisite is that courts of equity will not in general try disputed legal titles to land. But the rule is one of expediency and policy, rather than an essential condition and basis of the equitable jurisdiction."

Here, it is to be observed, the view set forth, that the doctrine that a court of equity will not, in such a case as this, proceed to determine the issues presented until the legal title, if controverted, is established in an action at law, is one having its foundation in expediency and policy, and not because a court of equity, as a matter of fact, has no jurisdiction to determine a cause where a legal title is disputed and is one of the issues presented for determination. The same author, in volume 1, p. 130, of said work, says, in speaking of the jurisdiction of a court of equity:

"On the contrary, as will be more fully stated hereafter, the objection that the case does not come within the so-called equity jurisdiction must ordinarily be definitely raised by the defendant at the commencement of the action, or else it will be regarded as waived, and the judgment will not even be erroneous."

In Modern Equity Practice, by Beach, sections 13 and 14 are as follows:

"Sec. 13. The objection that plaintiff has an adequate remedy at law should be raised by demurrer or by plea, or should be distinctly stated in the answer of the defendant. It comes too late at a hearing on the merits, when the court has jurisdiction of the parties and the subject-matter.

"Sec. 14. But when the case is one in which it is not competent for the court to grant the only relief asked, the remedy being at law, or it appears that chancery has not, under any circumstances, jurisdiction of the subject of the bill, the court will entertain the objection at any stage of the case, or sua sponte, and dismiss the bill."

I am of the opinion that these two sections state the correct position. As has been stated before, the relief asked in this case was equitable, and such as a court of law could not afford. An action of trespass, in which damages only could be recovered, cannot be considered as a substitute for an action which asks that a continuing trespass be prevented, and which trespass goes to the destruction of the estate of the plaintiff. In a case where equitable relief is demanded, the fact that there is a plain, speedy, and adequate remedy at law should be raised in the trial court, or it will be deemed waived. *Reynes* v. *Dumont,* 130 U. S. 354-395, 9 Sup. Ct. 486; *Kilbourn* v. *Sunderland,* 130 U. S. 505-514, 9 Sup. Ct. 594; *Tyler* v. *Savage,* 143 U. S. 79, 12 Sup. Ct. 340; *Brown* v. *Iron Co.,* 134 U. S. 539, 10 Sup. Ct. 604; *Iron Co.* v. *Reymert,* 45 N. Y. 703. The case at bar was not one in which there was any plain, speedy, and adequate remedy at law, but one that courts of equity, when the objection has been properly presented, would not proceed and determine, as a matter of policy and expediency, until the legal title in dispute had been determined in an action at law. But the rule of waiver applied to the former class of cases should be more readily and unreservedly applied in the latter class of cases. For these reasons we hold that the appellees waived the objection that the issue as to the legal title of appellees had not been determined in an action at law before the court below entered the decree in this cause.

Counsel for appellees urge that whatever the court might

find as to the south vein being a part of a mineralized zone having its apex in the Silver King lode, the premises of appellant, still appellant would have no right to follow such lode on its downward course outside the side lines of said Silver King lode, because the location of the same was not made according to law, in this: that its end lines were not located parallel with each other. It has been observed that the appellant has a patent from the United States for its said lode. Its rights must be determined by the terms of this patent. The description in the patent of the Silver King lode gives it parallel end lines, and grants the right to follow all lodes on their dip outside of the side lines of the same, whose apex is within the surface lines of the claim, and whose strike is cut by the end lines of the claim extended perpendicularly downward. It is true, perhaps, that in the section of the mineral land act providing for the issuing of patents by the United States for lode claims there is no provision made for granting any extralateral rights. The language of section 2325, Rev. St., is:

"A patent for any land claimed and located for valuable deposits may be obtained in the following manner."

In section 2319, Rev. St., it is however, provided:

"All valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase."

It will be observed that the valuable mineral deposits above named are declared to be open to purchase, and that they are distinguished from the land in which they are found. In section 2322, Rev. St., it will be observed that a lode, vein, or ledge containing a valuable mineral deposit is distinguished from the ground in which the same is found. The grant in this section is:

"Shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their location, and of all veins, lodes and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines, extended downward vertically, although such veins, lodes or ledges may so far depart from a perpendicular in their course downward as to extend outside of the vertical side lines of such surface location."

Then follow the limitations of the grant, which it is not necessary to quote for a determination of the question now presented for consideration.

It will be observed that the lodes, veins or ledges granted are distinguished from the surface ground, and are made the subject of a separate grant, and to separate provisions. It may be that congress, considering the provisions of the common law which reserved in every grant from the crown all precious metals, wished to set this matter at rest in these provisions. When we come to the patent for mineral land again, we again observe that the land in which the vein, lode, or ledge is found is treated separately from that of said veins or lodes. Since the passage of the mineral act of 1872, the land department of the United States has given such an interpretation to the same as would allow of a patent to the locator of mineral lands for a lode claim; granting to him, not only the ground within the surface lines of his location, but also all lodes, veins, or ledges having their top or apex within the same, throughout their entire depth, although they might, on their dip extending downward into the earth, depart from the side lines of the ground granted. There was a limitation upon this right, which was described in the following language in the patent:

"Provided, that the right of possession to such outside parts of said veins, lodes or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward through the end lines of said lot (naming the same) so continued in their own direction that such planes will intersect such exterior part of said veins, lodes or ledges; and provided further, that nothing herein contained

shall authorize the grantees herein to enter upon the surface of a claim owned or possessed by another."

There has also been since said date a reservation in all patents of the ground described, which is as follows:

(1) "That the premises hereby granted, with the exception of the surface, may be entered by the proprietor of any other vein, lode or ledge, the top or apex of which lies outside of the boundaries of said granted premises, should the same in its dip be found to penetrate, intersect or extend into said premises, for the purpose of extracting and removing the ore from such other vein, lode or ledge."

Section 2320, Rev. St., provides for the location of mining claims "upon veins or lodes of quartz, or other rock in place, bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits." The act of January 22, 1880 (1 Supp. Rev. St. p. 276), speaks of vein, lode, or ledge sought to be patented.

The land department has considered, in view of all these provisions of the statute, that it was proper to word a patent for mineral land embracing a vein, lode, or ledge, as above described. To interfere with this construction of the said mineral land acts would disturb many rights long enjoyed. A contemporaneous construction of a statute by those compelled to act thereunder is entitled to great weight. The lodes, veins, or ledges conveyed are those embraced within the mining claim located and granted in the patent. The presumptions are in favor of the correctness of the land department in issuing this patent. Its action was within its jurisdiction, and we cannot go behind the same in a collateral action. Looking, then, at the patent, we observe that appellant was granted extralateral rights. If, then, appellant, in entering the premises embraced within the lines of appellees' claim, beneath the surface, followed down on its dip a lode whose apex was within its ground, and whose strike was cut by the end lines of its claim as patented, it was pursuing a course to which it had a legal right.

It is further urged by appellees that this court is bound by the findings of facts of the circuit court, unless they are found to be clearly and palpably erroneous. On an appeal in an equity suit, the whole case is before the court, and it is bound to decide the same, so far as it is in a condition to be decided, on its merits. Beach, Mod. Eq. Prac. p. 978; *Ridings* v. *Johnson,* 128 U. S. 212, 9 Sup. Ct. 72; *Garsed* v. *Beall,* 92 U. S. 684-695; *Johnson* v. *Harmon,* 94 U. S. 371. If a case has been referred to a master, and he has made findings of fact, there ought to be exceptions to the same, if any party to the suit is dissatisfied therewith, and a ruling upon the same made by the chancellor. If this course is not adopted, these findings cannot be reviewed on appeal. It is to be observed, however, that the findings of fact by the circuit court are not without some weight in considering the merits of the case. This case, therefore, is presented to this court upon its merits, and must be considered upon the evidence, with such aid as may be found in the findings of the circuit court. The main issue, upon the evidence, is as to whether what is called by the witnesses the "south vein" is a part of a mineralized zone, which may be denominated a "lode," and which has its apex in the Silver King ground, or is a separate vein or lode, having its apex in the Oriental No. 2 and Red Cloud mining claims. If it should be determined that this south vein is no part of a lode having its apex in said Silver King claim, then the difficult question that may be presented if the court should find otherwise is not involved. This question is as to what would be the rights of the parties if it was found that the south and north veins were part of one lode, as the said lode would be cut by the south side line of the Silver King lode and the north side line of the Oriental No. 2 and the Red Cloud claims. In considering the question as to whether this south vein is part of a mineralized zone, which would come under the definition of a "lode," as used in the mineral land act of congress, we are presented with the definition of a

"lode" as given by Justice Field in the *Eureka Case,* 4 Sawy. 302, Fed. Cas. No. 4,548. The definition made the term "lode" "applicable to any zone or belt of mineralized rock lying within boundaries clearly separating it from the neighboring rock. It includes, to use the language cited by counsel, all deposits of mineral matter found through a mineralized zone or belt coming from the same source, impressed with the same forms, and appearing to have been created by the same process." In considering this definition, the facts which confronted that distinguished jurist in that case should not be lost sight of. He found a lime-rock formation lying between two clearly-defined walls, each having a definite dip, one composed of shale and the other quartzite. The quartzite wall exhibited marks of movement on its surface; that is, attrition. This is one of the distinguishing marks of a vein or lode. This lime rock between said walls was of a peculiar character, and differing from that above the shale. The stratification common to lime rocks in their normal condition had by some force of nature been destroyed, and the whole mass crushed and fissured. There were two other facts presented by the evidence in that case which it would appear might also have been noticed by the distinguished jurist. The evidence presenting said facts has been read in this case, and made a part of the testimony of the witness Hammond. These facts are: (1) That the lime rock found between the walls named was what is called magnesian or dolomite lime rock. This is a lime rock which has through some dynamic force or agency, undergone a metamorphism. Usually such lime rock by one of said forces has been changed in its constituents, besides having its stratification destroyed. (2) That this class of lime rock often constitutes the lead or lode in which lead ores are found. In one portion of said evidence Mr. Hunt states that these dolomite or magnesian lime rocks are the formation in which most of the lead deposits of the world occur. He also quotes Mr. Van Cotta, to the effect that the

magnesian limestone itself has something to do with these deposits. The ores found in the Eureka were lead-silver ores. Let us see whether the facts in this case bring the premises in which the south, north, and middle veins are found within the definition of a "lode" found in the Eureka case. The country rock where these veins are found is a volcanic rock termed "liparite." It extends several miles above and to some distance below where these veins are found. In the ground between the north and south veins the liparite is more broken up than elsewhere, unless it be in the ground between the south vein and a vein south of this called the "AA and BB vein." In the fissures there is, perhaps, more spar than is elsewhere found in the liparite. The north vein rests upon a clearly defined foot wall. There is a hanging wall over the south vein. Between these two veins the liparite was softer than in other places, and there had occurred a greater kaolinization in its fissures than elsewhere. I have stated that it appears that there was a well-defined foot wall to the north vein and a hanging wall to the south vein. The evidence also shows that there was a clearly-defined foot wall to the south vein and a clearly-defined hanging wall, other than the hanging wall of the south vein, to the north vein. In fact the characteristics of the two veins are very similar. Mr. Janin, a witness for appellees, says, in speaking of the south vein:

"The vein itself has very strong and distinctive features of a foot wall that is continuous. The vein filling is to the south,—that is to say, towards the hanging-wall side,—with occasional breaks on the foot-wall side, where it shows some jasper, at least; and I presume it was a portion of the vein filling once. So it is easy to trace throughout the whole length of 2,000 feet on the surface, and also in depth. I therefore consider it to be a very continuous, strong vein, so far as it is marked and goes. The vein is like all other fissure veins, or, rather, it has the fissure faulting plane, because it shows some evidence of movement and the hanging-wall is somewhat broken. At the Oriental shaft on the upper level the foot-wall is very highly polished. Indeed, it shows slickensides very plainly, and it shows there must have been some movement."

A little further in his evidence the witness says this vein has a regular dip, which he describes. There are many other witnesses in the case who note and describe this foot wall, and some of the hanging wall of this south vein. It is not necessary to quote all this evidence. The witness Aldersley, who was examined on the part of appellant, admits that in some places he found the foot wall of this south vein. He says that the hanging wall thereof was for about four-fifths of the distance along its strike, as exposed, composed of what he terms "bird's-eye porphyry," or what is locally called "bird's-eye," and one-fifth mud or brown tufa. He says that this bird's-eye is all the way from 20 to 5 feet thick, according to the locality where found. In describing the north vein, upon cross-examination, the witness says:

"Q. The slip was there? A. Yes sir. Q. Now, then, when they took it out, did they take all out between the foot wall and the hanging wall at the surface? A. Not altogether. It has been taken out since the first working. Q. Well, was the hanging wall as well defined as at the foot wall? A. Yes, sir. Q. It was? A. Yes, sir. Q. The whole distance was? A. Yes, sir; well, no hanging wall is ever as well defined as the foot wall, in that position, and I would like to correct myself in that statement. Then that foot wall is a perfect plane, nearly,—as nearly as can be in a mine,—but the hanging wall did not have that condition. Q. Well, was there any hanging wall distinctly to be traced at the surface? A. Yes, sir. Q. Well, to what extent along the vein was that the case? A. Very near two-thirds of the way. Q. From which end? A. From the east end. Q. To where? A. From the east end two-thirds of the way westward. Q. Along the claim? A. Along the claim,—along the outcrop of the vein. * * * Q. Now, what was the appearance of the hanging wall for a distance from the surface down 20 feet? A. It had a perfectly smooth, but irregular, surface. Q. For twenty feet? A. Yes, sir. Q. And what extent on the strike of the vein,—whole distance? A. The whole distance, as far as I knew. There is some parts that are not exposed, and them I cannot vouch for. Q. But there is some of that wall exposed there, isn't it? A. Yes, sir. Q. That hanging wall? A. Yes, sir. Q. What is the character of the rock? A. Bird's-eye porphyry. Q. Bird's-eye porphyry right through? A. Yes, sir. Q. Any of it mud? A. No, sir. Q. How far below the surface, following that

bird's-eye porphyry, do you have to descend before you strike the mud? A. At what point? Q. Any point. A. Well, as I said before, on the surface of the Cunningham shaft the mud is about 40. The bird's-eye is about 40 feet wide. Consequently the mud would be 40 feet from the vein. Q. What did you mean by 'mud' at that point? A. I mean a soft, friable sandstone. Q. Is it not porphyry? A. No, sir."

The witness in other parts of this evidence shows that this "bird's-eye porphyry," as he calls it, extends down as a hanging wall to this north vein to its lowest workings. This north vein, then, has all the characteristics of a vein or lode. It has a foot wall clearly defined, and a hanging wall clearly defined. In both the south vein and in the north vein spar impregnated with ore is found between these walls, as a rule. There is another fact worthy of remark. The vein still further south, called the "AA and BB vein," has been described. In the evidence of Mr. Hammond and other witnesses we find that this vein has also a liparite foot wall, and the material called "bird's-eye" for or on the hanging wall. This material is from 5 to 20 feet thick. This AA and BB vein is on a horizontal plane about 600 feet south of what is called the "north vein" in the Silver King ground. The characteristics of this vein and that of the south vein, so called, and also the country between them, are so similar to the north vein and the country rock between the north and south veins that the expert witness J. Ross Brown claims that it is also a part of the Silver King lode, and that all this country lying between the north vein and AA and BB vein is one lode. Mr. Edwards, one of the witnesses for the appellees, says that spar in the region of all these veins is a part of the country rock. Considering all of the evidence, I am inclined to think this is correct. This spar occurs to a greater extent in some parts of the country than others. This fact would not prove, however, that, where it abounded in the fissures of the liparite, it proved that a vein existed. The appellant urges with some force that the assays made from the ground show that from

the foot wall of the south vein to the north vein, the whole mass is impregnated with silver, and that the country south of the south vein does not show this condition. But it should be borne in mind that the material sampled south of the south vein was the mud or brown tufa. This was no fair test. That there is liparite between the south vein and the AA and BB vein would appear from the evidence as to the character of the foot wall of this last-named vein. The evidence, I think, shows that this brown tufa or mud is only a surface deposit resting upon liparite, which is the prevailing country rock. This is the opinion of Mr. Janin. To have presented a fair test, the liparite south of the south vein should have been tested. The mining engineers and scientific witnesses who gave evidence in this case did not differ materially as to the physical facts presented, but, as is usual with such witnesses, according to the sides in whose interests they were sworn, they had different opinions as to what these facts demonstrated. The circuit court inclined to place the greatest reliance upon the opinion of Mr. Janin. As we consider the facts in this case, we are disposed to concur in that view. We cannot see that the facts presented in this case are of the character which confronted the court in the Eureka Case. In the case of *Mining Co.* v. *Callison*, 5 Sawy. 439, Fed. Cas. No. 9,886, the court said, in speaking of the Eureka Case:

> **"It never was intended in that case to hold that every metalliferous country to which boundaries could be found must be regarded as one vein or lode, for this would reduce all mining districts to one lode."**

Judge Sawyer, who was one of the judges who sat with Justice Field in the Eureka Case, also presided at the trial of this last case.

We hold, therefore, that what has been termed the "south vein" is no part of the Silver King lode, but a separate and distinct lode, meeting the usual definition of a "lode" or "vein;" that is, an aggregation of mineral matter containing

ores in fissures of rocks. So far as this vein lies within the boundaries of Oriental No. 2 and the Red Cloud mining claims, it belonged to the appellees (the plaintiffs in the court below), and the appellant had no right to enter upon the same.

The appellant presents another question for consideration. It is claimed that, admitting that the south vein is no part of the Silver King lode, still appellant should not be enjoined from entering upon the same, for the reason, as it is urged, that the end lines of the Silver King cut this vein. It would appear from the evidence that this south vein on its eastern strike does enter the Silver King ground, and passes out of its east end line. The apex of this vein is not shown to be in the ground at this point, but it is a fair presumption that it is, from its course and dip. The said vein, on its westerly strike beneath the surface, until it passes the westerly end line of the Silver King claim, is within the Oriental No. 2 and Red Cloud claims. The cropping of the apex of this vein, however, on the Red Cloud premises, has a course towards the south side of the Silver King lode. In fact, there are some croppings cut by this south side line that are supposed to belong to this vein. This is not, however, fully established. The evidence is not sufficient to show that the apex of this vein is found anywhere within the Silver King premises opposite to the Red Cloud lode. The burden of proving this was upon the appellant, as the vein in this locality beneath the surface of the Silver King is nowhere found. If the vein in its course from east to west should be found, along on its apex, to pass out of the Silver King lode and into the Oriental No. 2 ground, from this into the Red Cloud ground, and then back again into the Silver King premises, and westerly out of its west end line, there certainly could be no right in appellant to any part of the vein, the apex of which was not in the Silver King premises. The grant is to lodes having their apex in the ground patented. The fact that a part of the apex

might be in the ground granted would not give any right to that part of the apex which is not therein, although the apex might be cut by both end lines of the granted premises. There is no case that supports this doctrine. The case of *Bullion M. Co.* v. *Eureka Hill M. Co.*, 5 Utah, 3, 11 Pac. 515, is a case where the croppings were cut on the strike of the same by a side line of a location. The court gave the vein to the oldest locator. The case of *Argentine M. Co.* v. *Terrible M. Co..*, 122 U. S. 478, 7 Sup. Ct. 1356, cannot be well understood from the statement of facts in the case. It is believed, however, that the facts in this case showed that the vein in dispute and its croppings on their strike passed out of one claim into the other in a circular course, and crossed the Adelaide claim from one side line to the other. The parties litigant came together in the Adelaide ground in following down from the croppings in the surface premises of each on the dip. The court gave the ground in dispute to the oldest locator. It would appear that, according to their locations, both had lateral rights. The only question that could arise, if the facts were as appellant claims, is whether it could follow down on the lode from that part of the apex thereof in its premises into the premises of appellees. This is a disputed question in mining litigation. As I have stated, however, the evidence does not warrant the court in saying that there is any part of the apex of the south vein in the Silver King premises opposite the Red Cloud claim. As to what would be the right of appellant in the Oriental No. 2 premises, if the south vein, after it passes on its strike into the Silver King ground, on its dip entered the Oriental claim, we do not decide. The case is not argued and presented to us upon that state of facts. It does not appear that, from the point where the apex of the south vein going east may cross the south side line of the Silver King claim, the appellant has entered the Oriental No. 2 premises on the dip of the same. We have nothing presented, then, upon which to base a decision. The decree of the court below is therefore affirmed.

ELIZA WILLIAMSON ET AL. v. J. T. JONES ET AL.

(43 West Virginia 562; 27 S. E. 411. Supreme Court of Appeals. June 11, 1897.)

[1]Petroleum oil in place is part of the land. Its wrongful extraction by one lawfully in possession is waste, and by a stranger is trespass; in both cases irreparable injury, which may be enjoined.

It is waste in a tenant for life to take petroleum oil from the land, for which he is liable to the reversioner or remainder-man in fee.

[2]Like unopened mines. A tenant for life may work open salt or oil wells or mines even to exhaustion, without account, but cannot open new ones.

[3]Must account. It is waste in a tenant in common to take petroleum

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[1]Oil in place is land. *Thompson* v. *Noble*, 11 M. R. 137. *Bettman* v. *Harness*, 18 M. R. 500.

[2]Life tenant may work to exhaustion mines open at commencement of her term. *Sayers* v. *Hoskinson*, 110 Pa. 473; 1 Atl. 308.

Tenant for life has the right to royalties from open mines. *Koen* v. *Bartlett*, 18 M. R. 289.

Rights of remainderman and tenant for life in oil royalties. *Blakley* v. *Marshall*, 18 M. R. 350.

A life tenant has a right to a receiver in nature of an auditor to see that she gets her fraction of the produce of oil wells. *Higgins Co.* v. *Snow*, 113 Fed. 433.

[3]Customary royalty is a just and equitable measure of accounting in favor of idle against working co-tenants of mineral lands. *Fulmer's App.* 17 M. R. 246.

It is not waste for one co-tenant to work the common property and where he develops a mine he should be allowed on accounting, all expenses including cost of buying in a hostile title. *McCord* v. *Oakland Co.* 64 Cal. 134; 49 Am. R. 686. There seem to be no cases treating the working co-tenant as a trespasser except under statute to such effect as in Montana. *Anaconda Co.* v. *Butte Co.* 17 Mont. 519; 43 Pac. 924. *Butte Co.* v. *Montana Co.* 24 Mont. 125; 60 Pac. 1039, cited in note to *Peo.* v. *District Court*, 20 M. R. —. Lindley § 789a; Snyder § 1435.

At common law he could not be called upon to account at all and where he may be by statute, he must be allowed all expenditures. *Edsall* v. *Merrill*, 37 N. J. Eq. 117.

The position of the text case on this point and on the measure of accounting is harsh, and the judge rendering the opinion was even

oil from land, for which he is liable to his co-tenants to the extent of their right in the land.

Things part of the land, wrongfully severed by a tenant for life, become personalty, but belong to the owner of the next vested estate of inheritance in reversion or the remainder, not the life tenant.

Injunction. Where there is a life tenant, and timber or other thing part of the realty going to loss, and imperative need calls for it, equity may cause it to be cut or otherwise secured for the remainder-man or reversioner. Equity has power to do so, if it do no harm to the life tenant, or he be compensated.

Silence no estoppel. If one claiming sole right to another's land spends money in improving or operating upon it, though ignorant of that other's right, the mere silence of that other will not estop him from asserting his title. He need not seek the other to tell him of his right, or speak at all, unless placed in such a situation as calls upon him to declare his right.

A purchaser at a judicial sale is conclusively held as having notice of all facts touching the rights of others in the property sold, disclosed by the record of the case.

Reversioners are indispensable parties. Owners of vested estates in reversion and remainder, whether by legal or equitable title, are indispensable parties to a chancery suit to sell the fee; and the presence as parties of a tenant for life, or of the trustee holding for them, does not make them parties by representation, and a sale under the decree will not affect or pass their right in the land.

Fraud of married woman. A married woman cannot, by even fraudulent conduct, be barred under the principle of estoppel in pais from asserting her title to land, though separate estate; but as to her personal estate it is different. Now that she is enabled to contract as if single, she will be bound by estoppel in pais touching her contracts as if single.

Fraud of infant. An infant of years of discretion, by intentional fraudulent conduct, will be barred, under the doctrine of estoppel in pais, from asserting her title to either real or personal property against one misled thereby.

Rents and profits. A tenant for life, or a tenant in common in sole

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inclined to not allow the cost of sinking the wells which gave the knowledge of value to the tract, though he consents to be overruled on this point by his colleagues. (p. 55.) To have refused such allowance would have been the grossest oppression. It is notable also that the court on the first appeal had decided to the reverse of what the text case holds—conceding that the co-tenant had a right to sink the wells and that the damage to co-tenants was only the fair rental value. 39 W. Va. 264.

possession claiming exclusive ownership, taking petroleum oil, and converting it to his exclusive use, is liable to account on the basis of rents and profits, not for annual rental.

Remainder-man as party. A remainder-man or reversioner has jurisdiction in equity against a tenant for life to enjoin waste, and to have compensation for the damages, the same as if he sued at law, to avoid multiplicity of suits. The same is the case between tenants in common where one is guilty of waste.

Severance vests title. A tenant for life, who, by waste, has severed from the realty things that are part of it, as petroleum oil, has no right to have their proceeds invested so he may have interest thereon during the life estate, but their proceeds go at once to the owner of the next vested estate of inheritance.

Bona fide improvements. One making permanent improvements on land as if his own, at a time when there was reason to believe his title good, is to be allowed their value, so far as they enhance the value of the land; but if, when making them, he has notice, actual or constructive, of the superior right of another, he cannot be allowed them.

Mistake of law. One having notice of facts rendering his title inferior to another's, who, by mistake of law, regards his title good, cannot claim for permanent improvements.

Allowed cost of production. Under the circumstances, a party taking petroleum oil unlawfully is allowed all costs of production, including costs of boring productive wells, as a set-off against rents and profits.

(Syllabus by the Court.)

Appeal from Circuit Court, Tyler County.

Bill by Eliza Williamson and others against J. T. Jones and others. Decree for complainants, and defendant Jones appeals. Reversed.

CALDWELL & CALDWELL for appellant.

W. P. HUBBARD, THOS. L. STEATEY, H. P. CAMDEN, and GEO. E. BOYD, for appellees.

BRANNON, J. I refer to the report of a former decision in this case for a full statement of the facts. 39 W. Va. 231,

19 S. E. 436. Under the judicial sale, Jones thought and claimed that he purchased the entirety of the two tracts,—one of 165 acres, and the other 45 poles; but, as seven undivided tenths vested by the will of David Hickman in Engle, as trustee, to hold for the use of his daughter Eliza Williamson for her life, with remainder to her sisters, and as the remainder-men were not parties to the suit, the decree of sale, and sale under it, were void and ineffectual to pass anything but the life estate in those seven-tenths, and so the remainder in them did not pass under the sale, but remained in the sisters of Eliza Williamson. Jones, however, took exclusive possession, claiming the whole. He bored 23 wells in the pursuit and production of petroleum oil. The plaintiffs sued him in equity to enjoin his further production of oil, and for an account of what he had produced. After the decision upon a former appeal an account was taken, and the circuit court held that Jones pay the owners of the seven-tenths of the land for one-eighth of seven-tenths of the oil produced, and seven-tenths of the value of the timber taken from the land, thus charging Jones only for one-eighth of the oil, that being the usual rent, commonly called "royalty," in that section stipulated and paid to the landowner under oil leases. Jones appeals, and he assigns error in charging him with anything at all, and for other causes; and the plaintiffs cross assign error in charging Jones only with one-eighth, and for other causes.

We start with the fact that Jones was owner of three undivided tenths in fee in possession, and owner of a life estate for the life of Mrs. Williamson in the remaining seven-tenths, and the plaintiffs owners of the remainder in fee in those seven-tenths; after the end of the life estate, a vested remainder; and, in this condition of right to the land, Jones bored 23 wells upon the land, and produced from May, 1892, to December 21, 1895, 622,281 barrels of petroleum oil therefrom, valued at $500,298. Did he have right to bore for this oil? He claims that he had, and that every barrel of it is

his, without liability to account to the plaintiffs; while the plaintiffs claim that he had no right to bore and produce this oil, but, having done so, he must account to them for full seven-tenths. Did Jones, as tenant for life, have right to extract this oil? He had not. Petroleum oil, in its place in the land, is a part of the land itself, just as are coal, timber, and iron. *Beltman* v. *Harness,* 42 W. Va. 433, 26 S. E. 271; *Williamson* v. *Jones,* 39 W. Va. 231, 19 S. E. 436. A tenant for life cannot do anything entailing permanent injury to the estate of the remainder-man or reversioner. He cannot, therefore, dig for gravel, lime, clay, stone, or the like; cannot open new mines for minerals. 1 Lomax, Dig. 54. If he take clay to make brick, not for repair of buildings, but for sale, it is waste. *University* v. *Tucker,* 31 W. Va. 622, 8 S. E. 410. It is the duty of the life tenant to protect the land from waste or injury even from others, and he must abstain from so doing himself. 1 Washb. Real Prop. p. 116, § 24; 1 Lomax, Dig. 57. Therefore, when Jones himself committed waste by boring for oil, he was a wrongdoer, so far as concerns his life estate. The remainder-men could sue him in an action of waste, as at common law under the English statute of Marlbridge, or in action of trespass on the case under chapter 92 of the Code, and recover the full value of their seven-tenths.

It is sought to show that Jones, as life tenant, had right to all the oil, by the case of *Koen* v. *Bartlett,* 41 W. Va. 559, 23 S. E. 664, but that case will not sustain this claim. It asserts only that a tenant for life may use the land and its profits, including mines of oil or gas open when his life estate begins, or lawfully opened and worked during its existence. There the owner in fee had made a lease for oil, with a royalty as rent, and then conveyed the fee, reserving a life estate, and it was held that he, as life tenant, was entitled, as against the remainder-man, to the royalty; but there the owner had authorized the boring for oil, and the conveyance was subject, in terms, to the lease, and, though the boring had not pro-

duced wells open at the commencement of the life estate, they were bored, under authority, during its continuance. We held that a mine bored in the period of the life estate, under prior authority, was to be deemed as if an open mine at the commencement of the life estate. It is established that an open mine may be worked to even exhaustion by the life tenant. *Crouch* v. *Puryear,* 1 Rand. (Va.) 258; 1 Lomax, Dig. 54. The offense of waste consists in the first penetration and opening of the soil, and it is not waste to dig in mines or pits already open, which have become part of the annual profit of the land. Tayl. Landl. & Ten. § 249a. When Jones penetrated the soil, he did so without warrant from his life tenancy, and without warrant from the creator of the life estate. There was no open well, no antecedent authority to bore one. *Koen* v. *Bartlett* is no help for him. It may occur that, if Jones could not bore, his life estate would be worthless to him. The oil might be drawn off by wells on an adjoining tract. As life tenant, he was entitled to none of it. Such is the quality of that estate.

Having seen that Jones, as life tenant, could not take this oil, we shall next inquire whether his right as owner in fee of three-tenths gave him right to do so. Jones was a tenant in common with the owners of the seven-tenths. By the old law one tenant in common was not liable to another for waste; but our Code of 1891 (chapter 92, § 2) has remedied this unreasonable rule by making tenants in common joint tenants and parceners liable for waste. 1 Lomax, Dig. 499; 2 Minor, Inst. 620. Then we have simply to inquire whether the extraction of oil is waste, and under authorities above given we must answer that it is. Those acts which would be waste in a tenant for life would be between tenants in common. As the statute uses the law word "waste," we must give it the legal meaning as applied to tenants for life. *Elwell* v. *Burnside,* 44 Barb. 447. Chapter 100, § 14, Code 1891, gives an action of account between tenants in common for receiving more

than his just share,—that is, more than his just share of rents and profits from the legitimate use of land; but this has no reference to waste. It does not license waste. There stands section 2, c. 92, branding it as a tort, and giving action for it, and it applies though one claim title to the whole, and commit waste. 28 Am. & Eng. Enc. Law, 895. As owner of three-tenths in fee, Jones could not bore for oil, any more than a stranger, because the act, whether done by a co-tenant or stranger, is a wrong. For this purpose he was a stranger, so far as the wrongful character of the act is concerned. He had right to possession for residence or other ordinary use working no injury to the inheritance, and therefore we term his act waste, not technically trespass as done by a stranger. "Waste is an injury to the freehold by one rightfully in possession. This marks the distinction between waste and trespass." 1 White & T. Lead. Cas. Eq. 1011. But the nature of the act is a tort in both cases; the same in both. Of course, a stranger would be liable for trespass; or, if he converts the oil from realty into personalty, the injured co-tenant may waive the trespass, and go for the value of the oil, or for the money for which the trespasser sold it. Indeed, Jones claimed to own the whole land, repudiated any co-ownership with the Hickman heirs, and thus assigned to himself the position of a stranger. This, however, only strengthens the argument that he is to be regarded a wrongdoer against the owners of the seven-tenths, as the statute makes him a wrongdoer though he were regarded as a tenant in common. It is therefore immaterial to define his exact caste; whether we regard him as a tenant in common or stranger it is the same. If oil wells had been already opened, Jones, as co-tenant, might set up claim under his three-tenths interest to work them, and take all profits under some cases. (*McCord* v. *Mining Co.* [Cal.] 27 Pac. 863); though I should think he would have to account under section 14, c. 100, Code. *Rust* v. *Rust,* 17 W. Va. 901. That would be no wrong; not waste. His life tenancy would

give him the right to take all the oil. But there were no oil wells on it, nor any precedent authority to open any. He first pierced the soil in quest of this fluid of fabulous wealth. He had no right to pierce it to get even his three-tenths of the oil. If he chose to do so, of every gallon seven-tenths belonged to the owners of the seven-tenths in the land, because it had been a part of their soil. These considerations repel all idea that as owner of the fee in three-tenths he could penetrate the soil, and convert to his sole use, without accounting, all the oil raised. It is true, an expression in a former opinion in this case said that Jones, as owner of three-tenths, had right to bore for oil, so he took no more than his share. This is not announced as law in the syllabus. On examination I find no warrant for this expression. The only materiality of this is that it may be claimed to enter into the process of the accounting for the oil, as, if its extraction was lawful, the charge against Jones might be different from what it would be if regarded a wrongdoer. It is, however, sought to be made by counsel a weapon of great potency. Counsel say that this court in the former opinion said that, the act of boring being lawful, and lawfulness of severance gave him who severed it the right to keep the whole, just as the right to use open mines by a life tenant gives him all the product, because he has right to sever. But in this case the severance is unlawful, and the legal deduction fails. Counsel from that expression would say further that when David Hickman, as owner of the seven-tenths, gave Mrs. Williamson a life estate, as he must have known as a matter of law that the owners of the other three-tenths would have the right to produce oil, he must be understood as contemplating that they might do so, and is to be taken as intending, if they did, that the life tenant should enjoy all the seven-tenths of the oil. As the owners of the three-tenths had no such right, the argument here again fails. In addition, this would give the life tenant, by mere implication (remote and weak implication at

that), a right to what her devise did not carry as an incident, —things a part of the soil, which can only go with it by express grant. It is argued that Hickman, in his devise of a life estate to his favorite daughter, Mrs. Williamson, did not prohibit waste; but as Judge Roane said in *Findlay* v. *Smith*, 6 Munf. 148, exemption from waste cannot result "from the omission to restrict waste in the will. That omission became unnecessary from the limited nature of the estate granted. The estate granted was only an estate for life, and it is incident thereto that waste shall not be committed. It would have been a work of supererogation to have inserted such a restriction, and the question may properly be retorted, why, if it were so intended, was not waste specially permitted by the will? This is not only not done, but the contrary is done, by granting an estate which carries with it the restriction as an incident. The silence of the will, in this particular, cannot weaken the rights of those in remainder. It cannot destroy rights conferred by law." At one time, to restrict a life tenant from waste, there must be a restriction in the grant; but now all tenants are forbidden to do waste by statute, unless their grant render them expressly unimpeachable for waste. 2 Minor, Inst. 616, 619; 1 Lomax, Dig. 56; 1 Washb. Real Prop. 107. Of course, when that which is a part of the realty is unlawfully severed, it belongs to him who has the first vested estate of inheritance at the date of severance, as he owns it. *University* v. *Tucker*, 31 W. Va. 621, 8 S. E. 410; Fearne, Rem. 341; *Whitfield* v. *Bewit*, 2 P. Wms. 240; 1 Lomax, Dig. 56. The owner of the severed chattel can alone seize it, or bring trover for its conversion, as it came from the inheritance, or claim the thing itself by replevy, or detinue, or bring trespass *de bonis asportatis* for damages for the taking of it, or *assumpsit* for money had and received from it. "Nor does it matter whether the timber is cut by a stranger or by the tenant (for life) himself, since the tenant cannot convey any interest in it when severed."

1 Washb. Real Prop. 119; 1 Lomax, Dig. 59; Freem. Coten. §§ 297, 302. For the same reason the co-tenant doing waste neither owns nor can sell what is not his. "If at the time of the improper working there is any person in being entitled, defeasibly or indefeasibly, to an estate of inheritance, the property in the severed chattels, or the amount to be accounted for, will belong absolutely and immediately to such person, or, if more than one, to the first of such persons, and his right is not affected by the circumstance that between his estate and that of the wrongdoer is interposed in the order of the limitations an estate for life in being even without impeachment of waste." McSwinney, Mines, c. 3, § 2 (B), p. 99; 1 Lomax, Dig. 56, 57; *Pigot* v. *Bullock,* 1 Ves. Jr. 479; *Birch-Wolf* v. *Birch,* L. R. 9 Eq. 683. This shows that Jones, as owner of the life estate intervening before the seven-tenths would be vested in possession could not keep the oil. "Oil in the earth belongs to the owner of the land, and when unlawfully taken therefrom by a wrongdoer the title of such owner remains perfect, and he may pursue and reclaim it wherever he may find it." *Hughes* v. *United Pipe Lines,* 119 N. Y. 423, 23 N. E. 1042. It may be said that these doctrines would leave the part owner powerless to get any benefit from the oil. If so, it must be as a quality of his estate. But it is not so; for, if he wished a partition, he was entitled to it, and thus could bore on his separate share, and take the oil on it, and perhaps drain all from the other, and hold it acquit of account for it; and, if he did not wish partition, oil being capable of loss from wells on lands near by, perhaps he could ask a court of equity to allow him to bore, and take his share of the oil, and pay the balance to the remainder-man, like that jurisdiction exercised by equity to direct timber in a state of decay to be cut down for the benefit of those entitled to the inheritance, if it would do no damage to the life tenant, compensating him for the use of the land. Here Jones was himself the life tenant. 1 Lomax, Dig. 60;

Story, Eq. Jur. § 919. Thus the owners of the seven-tenths in the land had plain legal title, and their rights are such as above given to seven-tenths of the oil, unless something not yet considered debars them from such rights.

It is urged strenuously, with great elaboration and ability, by counsel, that they are barred by the doctrine of estoppel in pais; that their conduct works this result. Here I first remark that a clear legal title to land, requiring written conveyance to transfer it, is, by this theory, to be devested out of its owners, and invested practically as effectually in others as if such conveyance existed. A clear, strong case of estoppel is required for such a result. What is the conduct of these parties bringing about this result? As to Mrs. Williamson, she having procured the decree of sale, and received its proceeds, is estopped. That is res judicata under our former decision. As to the other devisees of David Hickman, what have they done or left undone to estop them? It is said they ought to have made themselves parties to this suit. There is no force in this. Perhaps they did not want their land sold. There was no ground for the sale of their remainder for the debts of Thomas Jones, deceased, except perhaps one of their seven-tenths, as Jones' heirs had conveyed their interest before the suit. If anybody wanted to sell their land for debt, or because partition could not be made, or other cause, he must bring them and their estate before the court. Strange that any one is to lose his land because he did not cause himself to be sued. Counsel for Jones make their chief point under this head of estoppel by saying: "Because these plaintiffs stood by for eighteen months, and made no claim to the land or oil, knowing that Capt. Jones in good faith, and believing he had a perfect title in fee simple to the farm, was making great expenditures on the land in developing it as oil territory, and had paid $40,000 to buy interests of his co-purchasers, Tennant and Haskell, and paid up the deferred installments of the purchase money for the land, which he

would not have done unless he had believed that he had the sole and unquestioned title thereto, the said plaintiffs intending, if Captain Jones succeeded in developing the farm as oil territory, to bring this suit. If he did not succeed, they would let the sale stand without attack, and they would finally take and enjoy the avails and proceeds of the same." By no means does the evidence sustain these predications.

Admit, however, these as facts, they do not bar the plaintiffs. *First,* they do not predicate, nor does any evidence, any contract between the parties, giving Jones a right. The plaintiffs stand in no wise bound to Jones by any contractual relation. Then, to bar them, you must show such conduct as is misconduct amounting to fraud, and this is not shown by these facts, or others in the circumference of the case. Most of the cases cited to support this estoppel are cases in which there was privity or obligation springing from contract, or constructive or other trust. Such are *Clark* v. *Hart,* 6 H. L. Cas. 633; *Sumner* v. *Seaton,* 47 N. J. Eq. 119, 19 Atl. 884; *Galliher* v. *Cadwell,* 145 U. S. 372, 12 Sup. Ct. 873. There is no contract or trust here. Not the slightest obligation under contract, trust, or fiduciary relation bound these Hickman devisees to Jones. Let us see what is an estoppel by conduct. Let us see whether the defendants can meet its requirements. "An estoppel *in pais* operates where a person has made an admission or done an act with intent to influence the conduct of another, or that he has reason to believe will influence his conduct, inconsistent with the evidence he proposes now, or with the claim or title he proposes to set up, where the other party has been influenced by and has acted upon it, and where he would be prejudiced by the allowance of the claim or title set up." Judge English in *Railroad Co.* v. *Perdue,* 40 W. Va. 454, 21 S. E. 755, says that for an estoppel *in pais* there must be conduct, acts, language, or silence amounting to a representation or concealment of material facts, and the misrepresented or concealed facts known to the party sought to

be charged with the estoppel, and unknown to the other party, and the conduct must be with the expectation that it will be acted on, or will likely be; and Judge English further said: "The general rule is that, if a person interested in an estate knowingly misleads another into dealing with it, as if he were not interested, he will be compelled to make his representation good. It applies to one who denies his own title or incumbrance when inquired of by another who is about to purchase the land, or loan upon it; to one who knowingly suffers another to deal with the land as though it were his own, or to expend money in improvements without giving notice of his own claim or the like. In the light of the most recent decision, to preclude the owner of land from asserting his legal title under such circumstances, there must be shown either actual fraud or negligence equivalent to fraud in concealing his title, or that he was silent when the circumstances would compel an honest man to speak." The plaintiffs never accepted a dollar for the sale of the land under the decree. These plaintiffs were not at the judicial sale, standing by silent, or at the place of improvement; never said a word denying their title; never renounced it; never induced Tennant or Jones to buy or bore, never were inquired of as to their title, never were placed in such circumstances as to call upon them legally, nor perhaps even morally to speak out. All they are guilty of is silence, quiescence. They did not, it is true, seek Jones and warn him. This is their offense in length and breadth. Under the doctrine of estoppel above given, this is not enough. Bigelow, Frauds, 590, says: "Having now considered the subject of deception by act on all sides, we are next brought to the subject of deception by omission; in the case of silence, where there was a duty to speak. Now, silence alone, it may be declared as a general rule, is not unlawful in transactions between men at arm's length, however great the advantage gained thereby. A man's unpublished thought is surely his own. But it must be understood at the outset that

by silence we mean entire silence, as distinguished from that sort which merely keeps back part of the truth told or suggested. But, speaking of pure silence, the general rule stated is very strong. It governs even though the silence is meditated, and with knowledge that the other party was laboring under mistake or ignorance." These people were not bound to volunteer to warn Jones, and we can the more excuse them for silence and inaction—all they are guilty of—when we reflect that, if they knew anything about the title's condition, they knew Capt. Jones held the life estate, and they would have no right to possession until its end, which exculpates them from any animadversion for intentional wrong.

Again, it is not clear they knew their title, especially as some—nearly all—were infants and married women. If a business man like the defendant could not judge correctly of his title, could they? Moreover, I say that if one man chooses to go upon another's land, and clear and improve it, the mere failure of the owner to go to him and warn him not to do so will not take away the true owner's title. He is given the time fixed by the statute of limitations, though he do know that his adversary is expending money in improvements. He may every week pass along and see the work. Mere silence will not rob him of title until time does the work under the statute. Unless there is a duty to speak out, one need not. "To create a duty to speak, it must be known by the one keeping silence that some one is relying on that silence, and is either acting or is about to act as he would not have done had the truth been told." *Veile* v. *Judson,* 82 N. Y. 40. There is no proof that these parties knew Jones was relying on them or their silence, and in fact he shows himself he did not. But I say the test just put in the New York case is not strong enough. Mere silence and knowledge that another is relying on it is not enough. He must be brought into such close quarters or situation towards him as to call on him to speak out. Again, a potent fact against Jones on this estoppel is

that before Tennant, who, as his agent, bought at the judicial sale, Jones, knew of the defect of the title.

1. The record in the case stated that Thomas Jones died leaving 10 heirs; and the petition of Engle and Williamson, on which the sale of the whole tract was first based, stated that Eliza Williamson only owned a life estate in seven-tenths. Who owned the remainder? The very decree of sale declares: "It appearing to the court that the interests held by C. Engle as trustee as aforesaid are for the use and benefit for life of Eliza Williamson by virtue of a provision in the will and codicil of said David Hickman." Who owned the remainder? This record put this question to a purchaser. Prudence would make a man inquire where the real estate in the land was. A purchaser at a court sale purchases under the rule of caveat emptor (look out buyer). The court or commissioner warrants nothing. One buying at such a sale is held—conclusively held—to have notice of all the facts which the record, if inspected, would communicate. *Stout* v. *Mercantile* Co., 41 W. Va. 339, 23 S. E. 571; Pom. Eq. Jur. § 626; *Wood* v. *Krebbs,* 30 Grat. 708; *Burwell* v. *Fauber,* 21 Grat. 446. Where one claimed for improvements, such record notice was held enough to debar him as showing that he did not improve with *bona fide* belief that his title was good. *Hall* v. *Hall,* 30 W. Va. 785, 5 S. E. 260. Jones had actual notice of this defect of title, and of the fact that the plaintiffs owned the seven-tenths as the remainder. He, as a witness, says his agent, Tennant, to procure oil leases, reported to him that a lease of this land from Mrs. Williamson would not be safe, "as she only owned part in fee and a life interest in the balance," and the only way was to buy it. This knowledge defeats his plea of estoppel under cases cited above, and *Bettman* v. *Harness,* 42 W. Va. 433, 26 S. E. 271, and *Dawson* v. *Grow,* 29 W. Va. 333, 1. S. E. 564. A small modicum of prudence would have saved him. He heeded not this warning, but venturesomely risks a purchase,

and the expenditure of his money. He was not moved by any words or act or representation of the plaintiffs, nor by their silence, but hazarded his action in the spirit of speculation, not relying on their silence, but his own judgment. Jones says he claimed the whole, and would not have heeded the claim of the plaintiffs, if they had made it. It would not have stopped this expenditure. How can he lay his misfortune at their door? His counsel argue that the commissioner who sold told him it was a good title. Jones says he did not say he did so until July, 1893, and he had then bored all but two or three wells. But, what if he did? Are these plaintiffs responsible, even if the lawyer told him that it was not necessary to make the remainder-men parties? This mistake in legal opinion, does not bind the plaintiffs. He was not their lawyer. He had no authority, as commissioner, to bind them, or guaranty title, and they were not parties to the suit even. It is argued that the sale was made under decree with the knowledge and desire of the remainder-men, and this position is sought to be supported on circumstances entirely inadequate to sustain this contention. The judge who rendered the sale decree was father to children of one of the remainder-men, the commissioner was husband to another, and a son of David Hickman performed the clerical work of recording the decree; and the remainder-men must therefore have known of, and been satisfied with the decree, say counsel. This does not follow. Suppose they did know it, and were satisfied. If they did nothing active, it is not enough. One with legal title to land cannot, by oral disclaimer of right, even the most expressed, devest himself of legal right. *Cline* v. *Catron,* 22 Grat. 378; *Jackson* v. *Davis,* 15 Am. Dec. 451.

Counsel would explain why these remainder-men were not made parties, saying the lawyer in the case thought, as Jones' heirs were parties, and Mrs. Williamson owner of a life estate in seven-tenths and three-tenths in fee, they were not necessary parties, as Hickman purchased shares of Jones'

heirs after his death, and they were liable to his debts. They were not liable, except one of the seven-tenths; and anyhow they owned legal title to the remainder in fee, and were absolutely necessary parties, and neither they nor their estate were before the court, and their estate was not sold under the decree, and it was a nullity as to the remainder-men. No matter who made the mistake in the conduct of the suit, or how it came about, it could not prejudice these remainder-men. They can be bound only by record, not by a mere supposition, or even proof, that they knew or approved of it. The decree and deed under it conveyed no title. Mrs. Williamson, though before the court, was only life tenant of the seven-tenths, and there is no privity between life tenant and remainder-men, so that the presence of a life tenant as a party by representation makes the remainder-man a party. "A stranger, who is not a party or a privy, can neither be barred nor aided" by a judgment or decree. Bart. Ch. Prac. 213; 2 Pom. Eq. Jur. § 813. Engle was a dry trustee; the real owners of the remainder were the remainder-men. The trustee could not represent their interest. Even a creditor under a deed of trust, not merely a trustee, must be a party; much more the remainder-man in a case of dry trusteeship, where it is proposed to sell the very corpus or fee of the land, and all rights whatsoever therein. It is essential that there be before the court not merely the owner of particular estate, but also the owner of the first vested estate in reversion or remainder, and this was in these remainder-men. 1 Daniell, Ch. Prac. 227, 228; Story, Eq. Pl. §§ 144, 145; Opinion, *Faulkner* v. *Davis,* 18 Grat. 684. The trustee and life tenant not representing the remainder-men, and they being necessary parties to bring the fee of the land before the court, they are not bound by the sale. But this was decided on the former decision. Counsel ask, why, if the plaintiffs did not acquiesce in the sale, did they not adduce evidence to show that they did not? The burden to show acquiescence is on the de-

fendant asserting it. Mere acquiescence, if proven, would not devest their title. If these parties knew of the sale and boring, which is only by mere inference, there is evidence tending to show that they thought it was only Mrs. Williamson's interest that was sold, as she is shown to have been anxious to get rid of the land. It is not clear they knew of it; but, what if they did? Can their land be taken from them merely for that? So I conclude that estoppel in pais will not defeat the plain, legal right of the plaintiffs. But as some of them were infants and married women, even if there were facts to show such estoppel as is here contended for, it would not bind the married women or infants. They would not be guilty of such a fraud as would estop them.

The title of these plaintiffs vested before April 1, 1869, and therefore the interests of the married women were not separate estate. A distinction is made in a brief between land that is separate estate and that not separate estate, the theory being that as to separate estate the married woman may lose it by estoppel *in pais,* whereas she cannot so lose land not separate estate; but as, under our statute, her sole deed is void in both cases, and she could only pass either class of land by a deed with privy examination (when this transaction occurred), and now by acknowledgments, her husband joining, I do not see where any distinction comes in. Whether a married woman, by positive, intentional fraud, can lose her land, when her sole deed will not devest her of it, the authorities are divided. I should say that, as the law scrupulously limits her power of alienation to one only mode, she could not do so; that she could not do indirectly what she could not do directly by a solemn deed, because it is the policy and positive provision of statute that she shall be disabled by an act of hers to part with her land except in one way. Bigelow, Estop. 599; Bish. Mar. Wom. § 488; 2 Herm. Estop. § 1102. Note that I am speaking of her losing her land, not personalty, for I think she may thus lose her personalty, as she is competent

to sell that. But in this case no affirmative act of fraudulent representation is shown; only silence. If I be right in the position that actual fraudulent representation would not lose her right, for stronger reason mere silence would not; but, even if positive, affirmative fraud would lose her land, mere silence would not. 14 Am. & Eng. Enc. Law, 643, says that, as "such estoppels as arise out of failure to assert a right, or out of silence or acquiescence in the right claimed by others, arise only because from such silence and acquiescence a representation is implied, it is clear that a married woman can be bound by silence and acquiescence only in cases where she would have been bound had she expressly made the statement implied. Thus, where a married woman makes a void deed, she is not estopped, by afterwards recognizing its validity, and allowing the grantee to improve the property, from asserting her title, for she would not be estopped therefrom by expressly telling the grantee that she would never claim any title thereto; but, if she could contract as a *femme sole,* and allowed the grantee to improve the property on the faith of a title given him by her, she could not deny the validity of that title." It is cautious to observe that the law books say that, in order that a fraud by a married woman shall constitute an estoppel against her, it must be unconnected with a contract, because, as her contract would be void, her mere conduct connected with it would not operate to enforce it; but that was when she was disabled from contracting; and, now that our statute has fully enabled her to contract, I think that any fraudulent act which would estop her when not connected with a contract would also do so though connected with a contract. This limitation proceeded from her disability, and, that having been removed, the limitation would be removed. Bish. Mar. Wom. § 493; 1 Pom. Eq. Jur. § 418; *Tufts* v. *Copen,* 37 W. Va. 629, 16 S. E. 793. But observe, further, that as to selling and conveying her land she remains under limited disability. Wherefore I am clearly of opinion that the mere

silence or inaction of the married women—their quiescence, for it is not acquiescence—does not bar them.

How as to infants? Positive intentional fraud would bar an infant of years of discretion, but mere silence or quiescence surely will not. I think the weight of authority is that matter sufficient to raise an estoppel, if unconnected with a contract, would bar an infant from asserting a right even to land. It must, however, be intentionally fraudulent. Mere silence or quiescence, as in this case will not do so. Bigelow, Estop. 600; 2 Pom. Eq. Jur. § 815. The deed of a married woman is void; an infant's only voidable,—a difference.

I have discussed the question whether or not the plaintiffs are barred by the doctrine of estoppel *in pais* as an open question unaffected by the former decision, though it may be said plausibly that it did decide against that defense, in deciding that Jones must account on some basis. If a good bar, he would not have to account, and the court would have dismissed the bill. That decision did not decide finally that Jones rightfully bored for oil. It did not decide how much Jones should be charged, nor on what basis. That decision was, in terms, in these matters, not final, but provisional.

There cannot possibly be anything in the contention that laches bars relief. The delay from the judicial sale was only 18 months; from the commencement of boring, some less. The statute of limitations gives 10 years. The many cases of laches cited are cases of deeds or other things procured by fraud, as in *Whittaker* v. *Improvement Co.*, 34 W. Va. 230, 12 S. E. 507, where there must be promptness. Here is no such case, but simply one in adverse claim of another's land, or ouster by one tenant in common, or a suit to make Jones account for oil taken from the land; the statute giving five years. Why, in such case, plead laches short of the period fixed by statute? Viewed as a suit to recover possession,—but it is not,—time would not begin until the end of the life estate. *Merritt* v. *Hughes*, 36 W. Va. 357, 15 S. E.

56; *Arnold* v. *Bunnell,* 42 W. Va. 473, 26 S. E. 359. Time has no weight in any view of this case.

Having reached the conclusion that the plaintiffs have right to relief, the next question is as to what shall be charged to Jones, or the mode of account. It is not questioned, but may be stated as law pertinent to the case, that, though action at law in case for waste, or trover, or trespass de bonis, or perhaps pure trespass would lie, yet equity can take the account. It has indubitable jurisdiction for an injunction to restrain the waste. *Bettman* v. *Harness,* 42 W. Va. 433, 26 S. E. 271; *Williamson* v. *Jones,* 39 W. Va. 231, 19 S. E. 436. Having jurisdiction for one purpose, it will go on to do complete justice to avoid multiplicity of suits. *Chrislip* v. *Teter,* 43 W. Va. 356, 27 S. E. 288. And with respect to a suit of this particular caste to enjoin waste, it is clear equity will take an account, and give compensation for damages. Story, Eq. Jur. § 517; 1 Washb. Real Prop. 126. As above stated, Jones had no right to any of the oil as life tenant. As owner of the three-tenths of the land, he had no right to produce the oil, and his act in so doing was one of waste. When he did extract the oil, seven-tenths of it was by right and title oil of the plaintiffs, the very oil itself, because taken from their land. Jones converted this, their property, to his own use. They are entitled to recover the money he received for it, if ascertainable; if not, its value. It is urged that in a former opinion it is said that Jones had right to bore, so he did not take more than his share of the oil. Would not that leave the balance the property of the plaintiffs? I do not see that this expression that he had right to bore is material, unless it show, as counsel seeks to use it, that, having the right to bore, Jones had the right to keep all the oil; but that the opinion in words denies. The plaintiffs owned seven-tenths of the oil when it reached the surface. It has been converted to his own use by Jones. He claiming all the land, would be an ouster, took the oil under

adverse hostile claim, as an act of trespass. Indeed, the plaintiffs can treat it is an ouster. It is not a question of rent in the shape of royalty of one-eighth of the oil or otherwise, for royalty is rent, and springs from contract; and there was nothing contractual between these parties. If a stranger had bored, could the plaintiffs not render him liable for the conversion of their oil? Jones is as a stranger, a hostile claimant shutting them out; and, even if he had not claimed the whole land, but acknowledged their right to part of the land, the taking of the oil was waste, and gave him no right to their share. The former opinion says this.

It is claimed for Jones, if he is not allowed all the oil, he should pay only one-eighth of the seven-eighths as royalty. If he had worked already open wells, it might be more plausible to say so; but he first penetrated the soil as a wrongdoer, in a legal view. If an open well, it would be lawfully used by a life tenant, and probably by a tenant in common, as one mode of enjoyment of his share. I say probably. That matter is not before us. *Rust* v. *Rust,* 17 W. Va. 901, holds that where one tenant in common occupies the whole property he is liable to co-tenants for a reasonable rent for it in the condition it was in when he took possession. This is approved in the opinion in *Dodson* v. *Hays,* 29 W. Va. 601, 2 S. E. 415. This doctrine follows *Early* v. *Friend,* 16 Grat. 21. In the two West Virginia cases the use of the land was for ordinary purposes, not extracting minerals, and the occupying tenant had right to occupy and farm the land. The *Early Case* was the use of a salt well opened before the commencement of the co-tenancy, and perhaps the use of the salt water in making salt by the occupying tenant was lawful, as the use of the land in the condition it was in when he went upon it, and as it had been used by the ancestor. And besides, between him and some of the co-owners, there was a stipulated rent, which the judge gives as a reason for the charge of a rent; and besides he says the occupying co-tenant

and the others regarded it as a renting. And the court refrained from laying this down as an inexorable rule, saying there might be cases calling for an account of rents and profits. The case in hand is a case of a different hue; not the case of one cropping the land in that legitimate use which a tenant in common may make of the land; not use of open salt or oil well, which likely can be used by one tenant as it had been before; but where one pierces the earth, and takes from its place oil that is a part of the realty,—an act not of legitimate use, but destruction and waste of the inheritance of the others. Almost an exactly similar case to the one in hand is *Ruffners* v. *Lewis' Ex'rs,* 7 Leigh, 720, where persons claiming adversely to plaintiffs were held tenants in common with them, and had sole occupation, and had discovered salt, and bored wells. Great controversy arose as to the mode of charge against them. Held chargeable, not with rental, but rents and profits, if any made, with credit for expenses and improvements. *Graham* v. *Pierce,* 19 Grat. 28, is like unto this case. It was a case of lead mines, where parties jointly operated them for a time, and one continued to use the open mines. President Moncure said: "The court is further of opinion that although, as a general rule, where one tenant in common occupies and uses the common property to the exclusion of his co-tenants, or occupies more of the common property than his just share or proportion, the best measure of his accountability to his co-tenants may be their shares or proportions of a fair rent of the property so occupied and used by him, according to the principle laid down in the case of *Early* v. *Friend,* 16 Grat. 21, 52, yet, as was said in that case, 'there may be peculiar circumstances in a case, making it proper to resort to an account of issues, profits, etc., as a mode of adjustment between the tenants in common.' *Id.* 54; *Ruffners* v. *Lewis' Ex'rs,* 7 Leigh, 720." "Under the circumstances of this case it was proper to resort to an account of issues, profits, etc., as a mode of

adjustment between the tenants in common. It is not a case of land used for agricultural purposes only, in which there is no difficulty in ascertaining a fair rent for the use and occupation; nor is it such a case as that of *Early* v. *Friend*, where the property consisted of salt works, the yearly value of which might be ascertained with reasonable certainty, and where a money rent had been contracted for and paid to some of the tenants in common, which furnished a standard for ascertaining the amount due to others; but it is the case of a lead mine, the yearly value of which, and more especially of an undivided and uncertain portion of which, is incapable of ascertainment. Nor would it be just, in settling the account of issues and profits, to charge the occupying and operating tenants with a certain sum per ton for the quantity of ore raised from the mine, or to credit them with an estimated sum per ton for raising the ore and manufacturing the lead, as contended for by the appellants. Such a mode would be founded on conjecture merely, and would be very unequal and unjust, as it could not be known what would be the cost of raising ore, which would depend upon its situation in the mine, its degree of richness, and the facility or difficulty of getting at it, as well as upon the uncertain price of labor; nor what would be the cost of manufacturing lead, which would depend upon the varying price of labor and supplies. The best mode of settling such an account, and one which is perfectly just, supposing the tenant to have been capable and faithful, is to charge him with all his receipts, and credit him with all his expenses, on account of the operation of the mine." If the difference in the nature of a lead mine and a salt works was such as to require in the case of the former an account of rents and profits, with how much more force are we driven to the conclusion that in a property such as that in the case at bar, consisting of oil wells, the yearly value of which was still more uncertain and difficult of ascertainment, in which the cost of operation is still more

uncertain than that of the lead mine, the account must be taken as one of rents and profits.

In *Newman* v. *Newman,* 27 Grat. 722, the court had to determine the basis of an account between co-tenants of an iron mine. On pages 722 and 723, President Moncure refers to the cases of *Graham* v. *Pierce* and *Early* v. *Friend,* and quotes from *Graham* v. *Pierce,* the distinctions between the two cases there stated. The opinion says: "That was the case of a lead mine, while this is the case of an iron mine; and there seems to be no difference in principle between them on the subject we are now considering. A tenant of such property necessarily uses a part of the subject itself, and maybe such uses render the residue of the subject of little or no value. It may be discovered by explorations and operations that the property is of great value, or the contrary. To rent it for a certain sum is to make a bargain of speculation and hazard, which is always objectionable in such cases, as it is almost sure to operate unequally on the parties; whereas to carry on operations upon it for the joint and equal benefit of all the owners in proportion to their respective interests in the subject, and by the agency of persons (whether they have an interest therein or not) who may be amply compensated for their trouble, complete justice will be done to all parties concerned. It may be said that to carry on the business required a capital, which one of the parties did not have. But that matter may be adjusted by allowing interest to the party who advances the capital. In this case the property was of known and established value, and there would probably have been no difficulty in finding a suitable agent, and borrowing the necessary capital to carry on the operations, even if both had not been readily furnished by one of the parties." As counsel say: "Here are pointed out other facts which are also found in the case at bar, and which, it seems to me, are controlling and require the application to this case of the rule in *Graham* v. *Pierce.* Those facts are

that the development of oil property necessarily uses part of the subject itself more rapidly and completely than in the case of a lead mine, and renders the residue of the subject of no value whatever. It is even more true of an oil well than a lead mine that explorations and operations may show that it is of great value, or the contrary. The speculation and hazard are more in the case of an oil well than in that of a lead mine. Indeed, all that is said by Judge Moncure in *Newman* v. *Newman,* as quoted above, is applicable with added force in the case at bar. In both the Virginia cases in which a rent was charged (actually in one, nominally in the other) the property consisted of open mines, and the parties interested had theretofore settled accounts on the basis of a rent. Neither of those facts exists here, where the wells were not open; no rent had theretofore been charged, and the inheritance itself was being taken."

In *Dodge* v. *Davis,* 85 Iowa, 77, 52 N. W. 2, an instruction was held proper (pages 81, 82, 85 Iowa, and page 3, 52 N. W.) that a tenant in common was entitled to recover from a defendant co-tenant, who had ousted him, claiming exclusive right to use the land, in addition to a fair rent for the use of the premises, his share of the fair market value of the trees or timber, if any, that defendant sold to third parties off of said land. In *Huff* v. *McDonald,* 22 Ga. 131, relating to a gold mine, it was held: "A tenant in common, who receives more than his share of the profits of the common property, holds the surplus as bailiff for his co-tenant, who therefore stands to him as principal. He consequently is bound to pay his co-tenant the actual profits which he has made out of such surplus, as well as the surplus itself." In *Hayden* v. *Merrill,* 44 Vt. 336, the defendant co-tenant was held liable for profits, and not for rent. In *Shepard* v. *Richards,* 2 Gray, 424, the inquiry was to the profits received, not the rent due. In *Pearson* v. *Carlton,* 18 S. C. 47, an account for rents and profits (page 49) was held proper (pages 53,

54). This was a case where land was sold under decree where an heir was not a party, and he was given partition and rents and profits. That case refers to *Jones* v. *Massey,* 14 S. C. 292, which held that the accounting should be of rents and profits, and not of rental value. Such was the accounting in *Dewing* v. *Dewing,* 165 Mass. 230, 42 N. E. 1128. In *Winton Coal Co.* v. *Pancoast Coal Co.,* 170 Pa. St. 442, 33 Atl. 111, the court, after construing the statute of Anne, say: "Where the co-tenant has actually received the rent of the common property, or has converted coal, timber, gas, oil, or minerals—part thereof—into cash, and retains a share thereof which actually belongs to his co-owner, there would seem to be no good reason why, in a proper case, he may not be sued in assumpsit for his co-tenant's share thereof." See, also, *Fiquet* v. *Allison,* 12 Mich. 328; *Loomis* v. *O'Neil,* 73 Mich. 582, 41 N. W. 701; *Tuttle* v. *Campbell,* 74 Mich. 662, 42 N. W. 384. In *Job* v. *Potton,* L. R. 20 Eq. 84, the court regarded the defendant co-tenant as having been in all respects blameless, not a willful wrongdoer against whom the accounts would be taken rigorously, not negligent or tortious; so that, while he would be allowed for bringing the coal to the pit's mouth, but not for the expense of severance, but as having produced the coal in the exercise of a strict right (page 97), and decreed an account against the defendant for the value at the pit's mouth of the coal raised, less the cost of getting and raising it. The idea that he should be dismissed on payment of a rent does not seem to have occurred to any one.

It does seem to me on authority and reason that an account of rents and profits is the true basis. I cannot see how, where there is no lease, no contract, no tacit understanding between the parties, no past mode of business, but one not the true owner has used and received rents and profits from land of other people, you can charge an annual rental, and not their fraction of rents and profits received by the occupier.

What is to be done with the money to which the plaintiffs are entitled? Does it go to them at once, or is it to be put at interest, and Jones, as life tenant, get the interest on it, during Eliza Williamson's life, or a certain sum for its present worth?

As above shown, by reference to McSwinney on Mines, it goes at once to the plaintiffs, and Jones has no right to interest on it during the life estate: (1) Because he is, in a legal point of view, a wrongdoer, and, if given interest, this would give him the benefit of his own wrong. In *Williams v. Duke of Bolton,* 1 Cox, Ch. 72, 3 P. Wms. 268, a tenant for life committing waste, who owned the next existent estate of inheritance, subject to an intermediate contingent remainder, was not allowed to take advantage of his own wrong in cutting timber, but the fund was kept for the contingent remaindermen, and he was made to pay interest on it from the time the money for the timber was received. There are instances where the reversioner or remainder-man, during a life estate in another, wrongfully severs minerals, the proceeds are invested, and the income paid to the life tenant during life, though the minerals really belonged to the wrongdoer, because he could not take advantage of his wrong against the tenant. McSwinney, Mines, 65. This is doubtful, but shows how far courts go against one doing the unlawful act.

2. Jones is not entitled to interest, because he did not own a drop of the oil belonging to the owners of the seven-tenths. He is not entitled to the oil, and, of course, is not entitled to the income of interest from its proceeds.

The decree gave the collateral heirs of Dr. Weirich, husband of Laura Weirich, shares in the amount charged to Jones for the oil. I think this was error. Laura Weirich was a child of David Hickman, outliving her father, dying childless, leaving her husband, to whom by her will she gave all her interest in the estate of her father, "both as legatee and residuary distributee under his last will." The will of her

father gave her a legacy of $600 and some silverware. By clause 14 he provided that his real estate not before disposed of (and this land had been given to Mrs. Williamson for life with remainder to her sisters) be sold, and out of it and his personalty his debts paid and the bequests he made, and the residue divided equally among his daughters, among them Laura Weirich. The will of Laura Weirich would give her husband her legacy of $600 and the silverware, and her share in the residue arising from the sale of land and personalty, as the words, "both as legatee and residuary distributee," would in their legal import imply. They are subjects fitting those words in their legal meaning. She gave, too, "subject to certain devises and bequests hereinafter to be made," but made bequests,—no devises,—but used improperly the word "devise" in making bequests, tending to show still further that she had her mind on personalty, not realty. Her will gave nothing in this land. Hence her husband got no interest in this land, and she died intestate as to it; and as she died before the Code of 1868, and under the reign of clause 3, § 1, c. 123, Code 1860, it would go to her sisters, the plaintiffs, not to the husband, under section 1, cl. 2, c. 78, Code 1868. And besides, she died under Code 1860, and chapter 122, § 3, allowed a married woman to make will only of her separate estate; and this was not separate estate, because it vested in her before our first separate estate act (chapter 66, Code 1868).

As to the alleged error in not decreeing that the purchase money under the judicial sale, paid by the purchaser, be refunded to the purchaser, that was not cognizable in this case; but by some proceeding or step in the case in which the sale was had, or other independent proceeding, whatever it may be.

This decision may be burdensome to Jones, who appears to be a man of great energy, business capacity, and merit, and I will not conceal the wish that we could, consistently with

law, be more favorable to him; but we are bound by the law, seemingly very plain, and in itself logical and well established. The plain and simple showing of the voluminous record and contestation in this case is that he has taken sole and exclusive possession of land belonging in greater fraction to others, and of his own accord drawn from it vast quantities of oil belonging to them in clear law, and sold it, and reaped rich return, and the true owners demand their own under the law. If he was mistaken in his own judgment as to the title, or from misadvice, it is a misfortune that is to be regretted, but for which the plaintiffs are not legally responsible; and if he knew of the defect of title, and he surely had enough to warn him and put him upon inquiry before embarking in large expenditures, it seems only rashness, or rash speculation. In fact, however, the returns bored the wells after the first.

I have said so much only in consideration of the pecuniary magnitude of the case, and in deference to the elaboration, in the oral arguments and briefs of distinguished counsel, of the points involved in the case, which do not seem to me to be very difficult of solution, up to this point. As stated above, the charge against Jones is to be by rents and profits, not by annual rentals; but this presents a question which has given me great perplexity, and this is the question, what shall be credited to Jones against rents and profits?—especially whether he shall be repaid expense of boring wells. Where one man, in possession under a hostile defective claim or title, makes permanent improvements, the common law gave him no pay for them, as he voluntarily put them upon the land of another, but our Code (chapter 91) gives compensation therefor if, when the improvements are made, there is "reason to believe the title good under which he or they were holding." As shown above, warning was given Jones by Tennant, his agent, and by the record under which he purchased, of the rights of the plaintiffs, and our court has

held that this notice precludes allowance for improvements. *Hall* v. *Hall,* 30 W. Va. 779, 5 S. E. 260; *Dawson* v. *Grow,* 29 W. Va. 333, 1 S. E. 564; *Cain* v. *Cox,* 29 W. Va. 258, 1 S. E. 298; *Id.,* 23 W. Va. 613. Good faith would seem to be the test, but these cases affect Jones legally speaking, with a notice repelling good faith; and yet there is good ground for saying that, as a matter of fact, Jones, from misadvice as to the law, thought he was buying a good title. People generally think that a court sale always gives good title, whereas often it does not. Therefore, viewing Jones as an adverse claimant, or as one who, being really a tenant in common, yet takes sole possession, denying the claim of all others and claiming the entirety, and taking exclusively all rents and profits, it is difficult to accord him compensation consistently with dry law. Even where one joint tenant or tenant in common, not claiming the whole,—not denying his fellow's right,—makes permanent improvements, without his fellow's consent, he cannot charge him, nor hold exclusive possession until reimbursed by rents and profits. *Ward* v. *Ward's Heirs,* 40 W. Va. 611, 21 S. E. 746; Freem. Co-Ten. § 262. In *Creat* v. *Jack,* 3 Watts, 238, 27 Am. Dec. 353, and note, it was held that "a joint tenant or tenant in common may not erect buildings or make improvements without the consent of his co-tenants, and then claim to hold until reimbursed a proportion of the moneys expended. Nor will it alter the case that the co-tenant knew that the buildings were being erected, and made no objection." The opinion there says: "There are, however, cases in which an owner standing by, and permitting another to expend money in improving, has, in equity, been deemed a delinquent, and been compelled to surrender his right on receiving compensation, or else to pay for the improvement; but in these cases there is always some ingredient which would make it a fraud in the owner of the land to insist on his legal right. There is something like encouragement to the other's going on; or the

one party acts ignorantly, and without the means of better information, and the other remains silent when it is in his power to prevent him from expending his money under a delusion. To permit such a one to take advantage of the mistake would be revolting to every sentiment of justice. But, on the other hand, I know no case where equity has, on the mere ground of silence, relieved one who is perfectly acquainted with his rights, or has the means of becoming so, and yet willfully undertakes to proceed in expending money on the land of another without obtaining or asking his consent. His ignorance, if it exists, is willful, and he acts at his peril. In the case before us, there is no evidence that the plaintiff, in any respect, encouraged or connived at the erection of these buildings. Nor was the plaintiff bound to notify Blair of his right in the land, or of his dissent to the erection of the buildings. Blair was well acquainted with the title of the respective parties, and if he was not he was bound to inquire into the title before he undertook to appropriate the lot. It was a matter of record, accessible to all."

It is difficult to ignore the force of that argumentation in this case. In fact, if we turn to the case of *Foster* v. *Weaver,* 118 Pa. St. 42, 12 Atl. 313, and the principles stated in it, we could, with some plausibility, deny any cost of production at all. That case held that one tenant in common, tortiously deprived by fraud of his co-tenant of his interest in an oil lease, is entitled, in a suit brought for his share of the oil produced and converted by the co-tenant to recover as damages the value of the oil in the tank without deducting for expenses of production. The test there made as to such allowance is whether the party acted under honest mistake of good right, or otherwise; and seeing that our cases of *Hall* v. *Hall,* 30 W. Va. 779, 5 S. E. 260, and *Dawson* v. *Grow,* 29 W. Va. 333, 1 S. E. 564, upon the record of the case in which Jones purchased, and other circumstances, would affect him with notice and deny him improvements, I repeat that

there would be plausibility for denying any cost of production. The thought occurred to me that the record charged Jones with only constructive notice, not actual notice, and that perhaps actual notice was necessary; but *Hall* v. *Hall*, *Dawson* v. *Grow*, and *Cain* v. *Cox*, 29 W. Va. 258, 1 S. E. 298, and *Id.*, 23 W. Va. 613, reject this thought; also 10 Am. & Eng. Enc. Law, 247. *Effinger* v. *Hall*, 81 Va. 94, holds constructive notice tantamount to actual notice, but holds that purchasers at judicial sales may well presume everything rightly done, but that purchasers in pais must examine the chain of title. This exception as to judicial sales, I doubt, our case of *Hall* v. *Hall*, 30 W. Va. 779, 5 S. E. 260, is contra. The very record of the case in which the sale was made and Hickman's will spoke the rights of plaintiffs. If a man's deed tells him of another's right, why may we not say so when the record giving him title tells him of it? To say otherwise is to say that a purchaser at a court sale may shut his eyes to the contents of the record, which would notify him of another's right, make improvements, and then take away that other's rights, though by the sale he derived no title to such other's rights; the suit thus operating to do indirectly what it does not do directly. If Jones, by mistake of law, was led to believe that the court sale conferred good title, that will not serve him. Opinion in *Hall* v. *Hall*, 30 W. Va. 785, 5 S. E. 260; *Harner* v. *Price*, 17 W. Va. 523; 10 Am. & Eng. Enc. Law, 248, note.

But there are other considerations. We are in a court of equity, which often departs from dry legal rules in the interest of substantial, even-handed justice. It does not seem that there is any inflexible, iron-clad rule in equity in this matter, unless our statute imposes it. This is not the case of a suit to impose upon the co-owner a personal liability, or a liability on his land, for improvements, nor to continue in possession till future profits shall reimburse them; but it is a case where the plaintiffs ask an account to charge Jones

with rents and profits, and he seeks to set off improvements. Yea, more, it is a case where the plaintiffs ask to receive the benefit of the property in its improved condition,—to have the benefit of those improvements; that is, they ask pay for oil flowing through these very wells, without which wells there would not be a gallon of oil for them or for Jones. The law is well settled that in account of rents and profits you must charge the party for the property in its condition before his improvements, and not with the profits of his improvements (page 789, 30 W. Va., and page 265, 5 S. E.; Freem. Co.Ten. § 262; Code, c. 91, § 2; *Moore* v. *Ligon,* 30 W. Va. 155, 3 S. E. 576; *White* v. *Stuart,* 76 Va. 566; *Early* v. *Friend,* 16 Grat. 21; *Fishack* v. *Ball,* 34 W. Va. 644, 12 S. E. 856). This is a strong factor in the solution of this question. The plaintiffs demand their oil, solely the fruit of the pluck and courage and energy of Jones, in hazardous enterprises, which might have involved him in ruin. They come into a court of equity, asking that we accord them their legal rights, and they are given unto them, but it is an adage there that he who asks equity must himself do equity. He cannot, in every instance, eat the fruitage without sharing in the burden of the planting. I repeat that no immovable rule binds a court of equity in this manner. Freeman's Co-Tenancy & Partition (section 279) says: "Improvements made by one co-tenant, independent of any agreement so to do, may sometimes be proper matter to be considered in taking an account; but under what circumstances, and to what extent, improvements may be considered in taking an account between co-tenants, cannot be stated with desirable precision. It is probable, however, that they will not be made a subject of compensation, unless they are of a usual character and necessary for the ordinary and conceded use of the property." There is a difference between the case where the party making improvements seeks as an actor or plaintiff, to set up a debt against the co-owner or his land for improvements, and one where the co-owner calls on the other

to account for rents and profits; for in the former case, generally, the party will fail, and in the latter, if the party has acted in good faith, he will be allowed to set off improvements. See opinion in *Effinger* v. *Hall,* 81 Va. 103; 3 Pom. Eq. Jur. § 1241. There is some authority that where one has in good faith put improvements on land he may, by a suit of his own, charge the land. *Bright* v. *Boyd,* 1 Story, 478, Fed. Cas. No. 1,875. But unless there was an agreement or circumstances tantamount, or fraud, I would doubt this. Clearly, a consent to such improvement binds the party, and creates a lien on the land and a personal obligation. *Houston* v. *McCluney,* 8 W. Va. 135. (It is proper to remark that defendants claiming improvements under chapter 91, Code, may recover beyond rents and profits, if in good faith claimants.) I repeat that this suit is to charge Jones with rents and profits, and it is not inconsistent to allow him as a set-off expenses of production, including, not merely handling the oil, but the cost of boring productive wells, under the particular circumstances of the case, namely, that by reason of the energy and risk of Jones he developed this hitherto worthless land into an oil field of almost amazing wealth, yielding far beyond the cost of development, and leaving to go to the plaintiffs large returns. If we give Jones his expenditures, still a large amount goes to the plaintiffs; otherwise Jones loses them, and this would violate a rule of equity which, translated from the Latin, says that "by the natural law it is not right that any one should grow rich by the detriment and injury of another." Much authority can be shown to support this doctrine in addition to that given above. Story, Eq. Jur. § 1236, note; *Corcoran* v. *Corcoran* (Ind.) 21 N. E. 468; *Stewart* v. *Stewart* (Wis.) 63 N. W. 886; 11 Am. & Eng. Enc. Law, 1107. But for Jones' acts, this oil would not have been produced, so far as we can see; but for him perhaps this oil now enriching the plaintiffs would have been lost to them by being drained off by wells on adjoining lands. Under these circumstances, equity cannot be

blind to the argument that Jones' acts have been to the plaintiffs a blessing, not even in disguise, but plain and apparent. We cannot be deaf to the argument that the labor, enterprise, and business ability of this man, though technically in the wrong, appeal to a court of equity with strong call for liberality so far as to repay him by set-off all outlay in producing oil, including cost of productive wells, and we resolve any doubt by so holding. A debt for such improvement could not be made against the plaintiffs, nor would we say that all their oil could be thus absorbed; but here is a large surplus.

In conclusion, I must not omit to say that our holding in allowing cost of wells is fortified by the precedent of *Ruffners* v. *Lewis' Ex'rs*, 7 Leigh, 720, where parties, holding adversely to the plaintiff, were treated as tenants in common with them, and as they had bored wells, and discovered and produced salt water, were allowed improvements, including cost of wells, as set-offs against rents and profits, and even for abortive wells, the court saying: "The plaintiffs, if they will have advantage from their successors, must be content to share in their disappointments and failures. He who takes the profit must share the burden." True, in that case, the court found that the parties acted under fair belief of good title, so that their good faith could not be doubted. Here, under cases above cited, we cannot find that Jones is unaffected by notice of the plaintiffs' right; but for which I should not, for a moment, entertain any hesitancy in allowing him cost of wells. I have above treated the wells as if permanent improvements. Perhaps they are not to be so treated, but rather as a part of the cost of production, like a tank for keeping the oil when produced. An allowable improvement must be that which adds to—enhances the value of—the land permanently for general uses; but a well or derrick adds nothing permanently, at least for general use, and usable only for producing oil,—the mere means or instrument of production. If this be so, there is less question about allowing their cost as but an item in the cost of production,

though I have discussed the subject under the law relating to improvements. Treating cost of productive wells as cost of production of oil, we may say that, though Jones had notice of plaintiffs' right, yet he should be charged with net rents and profits, not gross,—with what he actually received,—otherwise equity inflicts a penalty. As an abortive well neither enhances the value, nor yields anything to the true owner, he ought not to be charged with its cost. I confess that, under our statute and decisions, I have hesitancy in this holding; but other members of the court do not, and feeling that Jones, under the circumstances, has strong claims to such allowance, I concur with other members in so holding. But the law ought to be clearly and accurately understood in so important a matter, and I want to state for myself what I understand to be the law, under our statute and decisions. An ejected defendant, who made permanent improvements valuable to the estate, not when he merely believed his title good, but when there was reason to believe it good, may by filing his claims under section 32, c. 90, and section 1, c. 91, Code 1891, not only set off the value of such improvements against rents and profits, but recover any balance by which their value may exceed rents and profits; but if, when the improvements were made, there was not reason to believe the title good, he cannot even set them off against rents and profits; and notice either actual or constructive, of the defect of the improver's title and of the rights of others will preclude allowance for such improvements. He is precluded because he acts in bad faith or negligence, and cannot take away even the rents and profits of another by improvements the latter did not sanction, which by the common law became part of the land and belonged to the true owner, no matter how they came there, and which the statute allowed only to one legally without blame. The wrongdoer is not given the benefit of his wrong.

Reversed and remanded.

W. A. RAYMOND v. S. W. JOHNSON.

(17 Washington 232; 49 Pac. 492. Supreme Court. June 25, 1897.)

[1]**Statute of frauds.** An agreement between two prospectors to look for lodes and locate and hold equally whatever either of them might find is not within the statute of frauds.

Association with co-discoverer. A. and B., two prospectors, agreed that they would be equally interested in their finds during the summer. B joins a third prospector C. and together B. and C. discover and locate a valuable claim. *Held*, that A. was entitled to one-half of the interest of B. in the claim.

Knowledge implied. Where the complaint set forth an agreement between the parties, defendant could not evade a positive denial by a denial in the answer of information or knowledge sufficient to form a belief as to the facts set forth.

Appeal from Superior Court, Spokane County; James Z. Moore, Judge.

Suit by W. A. Raymond against S. W. Johnson and others. From a judgment in favor of plaintiff, defendant Johnson appeals. Affirmed.

CYRUS HAPPY, for appellant.

WM. T. STOLL and R. E. PORTERFIELD, for respondent.

REAVIS, J. Respondent brought suit to have appellant, Johnson, declared respondent's trustee for an undivided one-fourth interest in the Keystone quartz mining claim, located in Flathead county, Mont., and to have the defendant Finch pay to respondent part of the bonded price of five-sixteenths of the claim, which is claimed to be proportionate to respondent's interest, instead of paying the same to appellant, John-

[1]*Murley* v. *Ennis*, 12 M. R. 360. *Moritz* v. *Lavelle*, 16 M. R. 236. *Meylette* v. *Brennan*, 20 Colo. 242; 38 Pac. 75. *Craw* v. *Wilson*, 18 M. R. 244.

son, through the defendant bank, as required by a bond held by Finch from Johnson; and in default of Finch's paying the price mentioned in the bond, that then appellant, Johnson, be required to convey to the respondent an undivided one-fourth interest in the claim, and that the defendant the Exchange National Bank be enjoined from delivering to the defendant Finch, or any other person, a deed in its custody, made by appellant, Johnson, to an interest in the claim, and that appellant, Johnson, be enjoined from assigning any interest thereafter in the mining claim.

The fourth allegation of the complaint is as follows:

"That in the summer of the year 1895 the said plaintiff and the said defendant S. W. Johnson entered into a mining partnership, by which they mutually agreed with each other that they would each diligently prospect for and locate and develop mines, mining claims, water rights, and mill sites in the states of Idaho and Montana on the public lands of the United States, and upon discovering or acquiring the same, or any such, that they would locate and hold and work the same in the joint names of and for the joint use and benefit of the plaintiff and defendant Johnson, and that they should own in equal shares any and all mineral claims, mines, water rights, and mill sites so discovered, or in any manner acquired, by either of them."

Respondent alleges that he has duly performed all the conditions of the agreement on his part, and that he diligently prospected as required by the agreement, in behalf of Johnson and himself; that while respondent and Johnson were prospecting, in pursuance of the agreement, they discovered some float or particles of ore which they thought came from a ledge of ore further up the mountain or hill upon which they were working, and Johnson requested respondent to follow up and trace the float, and prospect for a supposed ledge from which the float was thought to have come; and that he (Johnson) would go over on the other side of the

mountain, and search there, under the agreement, for mines and claims, and that while respondent was prospecting on the float, for the equal benefit of himself and Johnson, the latter went over the mountain or hill and continued to work, and there, with one Whitcomb, whom he chanced to meet, Johnson discovered a great and valuable lode of free milling gold ore on the unsurveyed and unclaimed public lands of the United States, and that Johnson, in violation of his agreement with respondent, and for the purpose of cheating and defrauding him, located the claim under the general mining laws of the United States in the names of Johnson and Whitcomb, excluding the respondent from all interest therein, and ever since has so fraudulently and dishonestly excluded respondent therefrom; that thereafter Johnson sold to defendant Gorham, by deed, an undivided one-sixteenth interest, and to one Watson an undivided two-sixteenths, and thereafter bonded to the defendant Finch, who was representing as trustee unknown parties, by a sufficient bond, an undivided five-sixteenths interest for the sum of $3,906.25, $100 of which was paid; that the deeds and the bond were duly recorded in Flathead county; that they were executed for the purpose of defrauding respondent out of his interest in the mining claim; that all the transfers and the bond were made without the knowledge or consent of respondent; that the mining claim is reasonably worth $20,000; that after the deeds and bond were executed Johnson executed a deed sufficient in form to the interest described in the bond in favor of Finch, trustee, and deposited the deed with the defendant bank at Spokane, Wash., to be delivered to Finch, trustee, when the purchase price mentioned was paid to the bank; that the bank received and now holds the deed, and has agreed to deliver it to Finch upon the payment of the money for the use and benefit of Johnson; that Finch has the money in his possession, and is about to pay the same to the bank; that Johnson is insolvent; that Whitcomb was a

locator in good faith; and is the owner of an undivided one-half interest in the claim, and that he had at the time of the location no notice of the relation existing between respondent and Johnson; that defendant Gorham claims an interest in the mining claim in addition to the one-sixteenth interest conveyed by deed, and Gorham also claims an interest in the moneys due on the bond on the five-sixteenths interest, but that Gorham's claim is inferior to that of respondent to the money and to respondent's interest in the mining claim; that after Johnson made the location as before mentioned he denied respondent's right to share in the claim, and respondent's right to share in the purchase price of the claim that is now due. Defendant denied having sufficient information to form a belief as to the matters stated in the fourth allegation of the complaint, and denied that the defendant Gorham claims an interest in addition to the one-sixteenth interest in the mining claim, or that Gorham claims an interest in the moneys due, mentioned in the bond to Finch; denies his insolvency; denies that the deed and bond were given to defraud respondent; admits the discovery and location of the mining claim by himself and Whitcomb; admits the bonding of the five-sixteenth interest in the claim to Finch, as alleged in the complaint, and for the sum mentioned.

The superior court, after hearing the testimony, found that the defendant Finch was trustee having charge of the matter of the bond for other persons, and that the averments in the fourth allegation of the complaint were true; that the respondent had performed his agreement; that the contract for partnership in prospecting and locating mines as set forth in the fourth allegation of the complaint was carried on, and that Johnson discovered the quartz mine described while such agreement existed; that the mine was located in the names of Johnson and Whitcomb; that Johnson had excluded respondent from any interest therein; and that Johnson had made the conveyances and the bond alleged in the complaint. The

tenth finding by the court was that the deeds and bond were given for the purpose of cheating and defrauding respondent out of his interest in the claim; and the eleventh, that they were made without the knowledge or consent of respondent; that the claim is reasonably worth $12,500; that Johnson had executed the deed and deposited the same with the defendant bank as alleged, and the bank had received the same; that Whitcomb was in good faith a locator, as alleged in the complaint, of the mining claim; that Johnson is insolvent, and is now the owner of five-sixteenths of the Keystone mining claim; that the respondent, by reason thereof, is owner of and entitled to the undivided one-half thereof,—that is, is the owner of and entitled to receive one-half of the unpaid portion of the amount due from the defendant Finch, trustee, as the purchase price, that is, to $1,950; and decree was entered according to the prayer of the complaint.

Defendants moved for a new trial, which motion was overruled. Defendant Johnson excepts to several findings of fact on the ground that the evidence is insufficient to justify the same. It is not necessary here to review the testimony. It has been carefully examined, and we are satisfied with the conclusions of fact reached by the superior court. The respondent and Johnson agreed to prospect together, and share alike the benefits of any discovery or location of mining properties, water rights, and other things mentioned in the fourth allegation of the complaint. It is true there was but little investment, if any, beyond a small "grub stake," by either in the enterprise, but they were to put their labor into it. Each was to diligently and faithfully prospect. In mining operations, this is usual. Frequently very humble and small beginnings lead to great results.

We observe no error in the superior court's ruling upon the proposed amendment to the answer after the trial was concluded. The proposed amendment was inconsistent with

the answer upon which the cause was tried, and, if made, could not have changed the result of the trial.

Defendant urges here that the contract between respondent and Johnson was oral, and is within the statute of frauds, as expressed in section 1422, 1 Hill's Code. This contention cannot be maintained. The defendant Johnson, if the acquisition of the mine was an interest in real estate, would be a trustee. The weight of authority in the mining states is that such contracts are not within the statute of frauds. *Gore* v. *McBrayer,* 18 Cal. 583; *Hirbour* v. *Reeding,* 3 Mont. 15; *Murley* v. *Ennis,* 2 Colo. 300; *Welland* v. *Huber,* 8 Nev. 203.

Appellant's answer to the fourth allegation of the complaint is a denial of information or knowledge sufficient to form a belief as to the facts set forth in the paragraph mentioned. It will be observed that the averment is an agreement between respondent and appellant. Presumptively, appellant had positive knowledge of these facts. The approved rule seems to be, when such knowledge is with the defendant, he cannot evade a positive denial by a disavowal of knowledge. We very much question whether the answer to the fourth paragraph of the complaint is sufficient to raise any issue of fact.

The judgment of the superior court is affirmed.

SCOTT, C. J., and DUNBAR, ANDERS, and GORDON, JJ., concur.

KIMBERLEY WATERWORKS COMPANY, LIMITED, DEFENDANTS; AND DE BEERS CONSOLIDATED MINES, LIMITED, PLAINTIFFS.

(L. R. App. Cas. (1897) 515. Privy Council. J. C.,* 1897; May 20; July 31. Two appeals consolidated.)

[1]**Monopoly contract to buy all water required.** Where a company agreed to buy all its water from a contracting party it is precluded from the right to build works of its own or accept gratuitous supply of water from other sources.

A reserve of the right to use the water from its own mines is not limited to the mines it operated at the date of the contract.

On appeal from the Supreme Court of the Cape of Good Hope.

Consolidated appeals from two decrees of the supreme court (March 1, 1895) reversing two decrees of the high court of Griqualand (Dec. 14, 1894).

The facts are stated in the judgment of their lordships.

COZENS-HARDY, Q. C. and HUME WILLIAMS, for the appellants.

[1]Discovery allowed against a coal company to aid an action at law against it for breach of its contract to sell to plaintiffs all the coal its mines produced. *Virginia Co.* v. *Hale*, 93 Ala. 543; 9 So. 256.

The covenant of a coal lessee to protect store orders of its employes on the lessor and to give this privilege to no one else, if unlawful as against public policy, does not vitiate the other covenants or avoid the lease. *Colo. F. & I. Co.* v. *Pryor*, 19 M. R. 544.

A contract for the purchase of all the phosphate which buyer can manufacture into fertilizers is entire and not divisible. *Loudenback Co.* v. *Tennessee Co.* 121 Fed. 298.

*Present: Lord Hobhouse, Lord Macnaghten, Lord Morris, Sir Richard Couch and Mr. Way.

COHEN, Q. C. and G. LAWRENCE, for the respondents.

1897, July 31, the judgment of their lordships was delivered by

LORD MORRIS. These appeals come from two orders of the supreme court of the Cape of Good Hope, dated March 1, 1895, whereby the orders of the high court of Griqualand of December, 1894, were reversed. There were two actions, in the first of which the respondents were plaintiffs and the appellants were defendants. In the second action the position of the parties was reversed. Both actions were tried and dealt with together by the high court of Griqualand, who gave judgment in both actions in favor of the appellants, while the supreme court of the Cape of Good Hope gave judgment in both actions in favor of the respondents, which judgments are the subject of this appeal.

It appears that before 1888 the appellants had by agreement with the Kimberley town council the exclusive right of supplying the municipality with water for a period of twenty-five years, to count from the year 1880. In 1888 the respondents, who are the owners of two mining properties —the Kimberley and De Beers—obtained an act of parliament by which certain rights and privileges were granted to them for the supply of water to the inhabitants of Beaconsfield and to the mining areas of Kimberley, De Beers, Dutoitspan, Bultfontein, and others. The respondents had also acquired all the concessions and rights of one Thomas Lynch. On November 26, 1888, the appellants and respondents entered into an agreement, the construction of which is the question in these appeals. By clause 1 the appellants, on or before January 1, following, agreed to pay the respondents the sum of £10,000 in cash. Clause 2 of the said agreement was as follows:

"That the said Kimberley Waterworks Company, Limited,

shall from and after the first day of December eighteen hundred and eighty-eight supply and continue to supply the mining companies and persons engaged in mining the Kimberley and De Beers mines with water for their mining purposes at the price of eight pence per one hundred gallons and shall also from time to time as any mining companies or mining properties in the Dutiotspan, or Bultfontein mines or mines adjacent thereto are acquired by purchase, hire or otherwise, or become amalgamated with the De Beers Consolidated Mines, Limited, supply and continue to supply such companies and properties with water for their mining purposes at the price of eight pence per one hundred gallons."

The rates previously charged were 1s. 3d. per 100 gallons.

Clauses 6 and 7 were as follows:

"That the said De Beers Consolidated Mines, Limited, shall at all times for and during the whole and full term of this agreement obtain and purchase all the water required by them for their mining purposes from the said Kimberley Waterworks Company, Limited, and from no other person or persons or company or companies whatsoever: Provided, however, that nothing herein contained shall prevent the said company from using any water obtained by it from the mines or from its wells or reservoirs.

"7. That the said De Beers Consolidated Mines, Limited, shall not at any time during the term of this agreement directly or indirectly establish, promote, or assist in the establishment or promotion of any water or other company, or venture in the district of Kimberley having objects similar to those of the Kimberley Waterworks Company, Limited, but that they shall and will at all times whenever called upon to do so by the said Kimberley Waterworks Company, Limited, use their utmost means and endeavors to oppose any company or venture, or attempted venture or undertaking having for its object or partial object the supply of water to

the mines of Kimberley, De Beers, Dutoitspan, Bultfontein, and the neighborhood."

In December, 1891, the respondents purchased a farm upon which there is a mine called the Premier mine. Large quantities of underground water accumulate in the said mine. The respondents claimed a right under the proviso of s. 6 of the agreement to use for mining purposes the water made by the Premier mine. It lies about four miles distant from the De Beers mine, and is outside the municipality of Kimberley. It has not been argued on behalf of the respondents that the Premier mine was "adjacent" within the meaning of clause 2 of the agreement. The respondents in March, 1894, brought an action for a declaration of their right to use the water of the Premier mine for mining purposes in their other mines, and this is the subject of the first action. The subject of the second, or cross, action by the appellants against the respondents was for constructing an artificial drain from the Transvaal road and conducting large quantities of water for the purpose of using in their mines, Kimberley and De Beers, in breach of the said agreement, and claimed damages by reason of such breach, and an injunction. At the time of the agreement of November 26, 1888, the respondents had on their property a reservoir for collecting the surface water thereof called the Kenilworth dam. Before 1894 the corporation of Kimberley had carried along the west side of the highway, called the Transvaal road, storm water falling on part of the township. The water was not carried to the respondents' property, whose dam was on the east side of the road, but to a place called the White dam. In January, 1894, the respondents obtained the permission of the town council of Kimberley to construct a dish drain across the Transvaal road, and thereby bring the water which had accumulated on the property of the town council into the Kenilworth dam on the property of the re-

spondents. The appellants remonstrated against such permission being given, but prior thereto the town council had given the permission and refused to withdraw it. The respondents thereupon constructed the dish drain, and brought the water which had been the property of the town council into their own land and used it for their mining purposes. In this second, or cross, action the appellants obtained a verdict of £100 for damages, and also an injunction restraining the respondents from thereafter committing the breach complained of. The high court of Griqualand decided that the using of water from the Premier mine for mining purposes, which was the subject of the first action, and the using the water obtained by permission of the town council of Kimberley, the subject of the second action, were both breaches of the agreement of November 26, 1888. The supreme court of the Cape of Good Hope, on appeal, decided that the respondents had committed no breach of the agreement and were entitled to use the water, the subject matter of both actions, as they were doing. They were of opinion that to constitute a breach the respondents must have used water which they had obtained by means of a purchase, or by means of some transaction equivalent to a purchase. Their lordships are unable to concur in this view. The prohibition contained in paragraph 6 of the agreement compels the respondents to obtain and purchase all the water *required* by them for mining purposes from the appellants and from no other person or persons whatsoever. The supreme court do not appear to have sufficiently considered the effect of the word "required" in the paragraph. There is an obligation on the respondents to get their mining water from, and to pay for it to, the appellants, and it can make no difference whether they get mining water so required for nothing or whether they pay for it to any other person. It would be a curious result if the appellants should be deprived of the monopoly they had bargained for because the respondents,

although they got the water from another did not pay for it. The respondents in obtaining water from the town council were acting in contravention of the spirit and of the letter of the agreement entered into by them with the appellants. Their lordships are consequently of opinion that the appellants are entitled to retain their verdict in the second action. As to the first action dealing with the use of the water made by the Premier mine, their lordships are of opinion that the proviso in paragraph 6 protects the respondents. The Premier mine and the water made in it are the property of the respondents. Paragraph 2 contemplated the purchase of mines by the respondents, and although the Premier mine is not adjacent within the meaning of paragraph 2, and the appellants consequently are not bound to supply it, by paragraph 6 the respondents are entitled to obtain all water from the mines, and there is no limitation of "the mines" to the mines in existence at the time of the agreement.

Their lordships are therefore of opinion that the order made on the first action by the supreme court of the Cape of Good Hope should be affirmed, and that the order made on the second action should be reversed, and the order of the high court of Griqualand in that second action should be restored, and their lordships will so humbly advise Her Majesty, the appellants to have the costs of the second action in the high court of Griqualand and the supreme court of the Cape of Good Hope. The parties shall bear their own costs of the appeals.

Solicitors for appellants, RENSHAW, KEKEWICH & SMITH.

Solicitors for respondents, HOLLAMS, SONS, COWARD & HAWKSLEY.

JUSTICE MINING CO. v. JOHN BARCLAY ET AL.

(82 Federal 554. Circuit Court, District of Nevada. August 9, 1897.)

[1]**Range of evidence in disputed lode continuity.** On a question of the identity or continuity of lodes; of whether there is but one lode or several lodes; a wide latitude of evidence is allowed and a divergence of opinion is to be expected.

Annual labor resumed in time. Although the owner of a location has failed to do the necessary assessment work, so that the ground is subject to a relocation, yet if, before any such relocation by others, he perform the amount of assessment work required by the statute, then his rights are revived, and a subsequent relocation is invalid.

Work done on one of group. Assessment done on one of several adjoining claims may count for all, but in such case it must be for the benefit of all the claims to be protected.

[2]**Work done on a patented claim** under the above conditions is available to protect the possessory claims.

Intermediate relocation. Revived title relates back. Where relocations have been made after the owner of the original location has failed beyond the statutory time to do the necessary assessment work, but such relocations are afterwards abandoned, and thereafter the owner of the original location performs assessment work which revives his rights, the fact of such intermediate relocations cannot aid one who subsequently attempts to relocate the same ground.

The employment of a watchman is proof of possession if not of annual labor.

A lessee cannot make a valid location of the demised ground.

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[1]The "largest latitude" should be allowed to both the judge and the witnesses. *Cheesman* v. *Hart*, 16 M. R. 270.

A "theory" as to vein formation requires for its proof a preponderance of evidence merely as on any other ordinary issue. *Silver Co.* v. *Fall*, 5 M. R. 283.

Stronger evidence is required as to continuity than would be to prove existence of vein in a discovery. *Fitzgerald* v. *Clark*, 17 Mont. 100; 42 Pac. 273.

Discussion of "considerable interval" or "distance" as phrases used in instructions concerning proof of continuous vein. *Butte Co.* v. *Societe*, 23 Mont. 177; 58 Pac. 111.

Continuity proved for 2,800 feet. *Penna. Co.* v. *Grass Valley Co.* 117 Fed. 509; 22 M. R. —.

It is error to exclude assays as proof of mineral in shaft. *Healey* v. *Rupp*, 28 Colo. 102; 21 M. R. —.

[2]*Hall* v. *Kearny*, 17 M. R. 594.

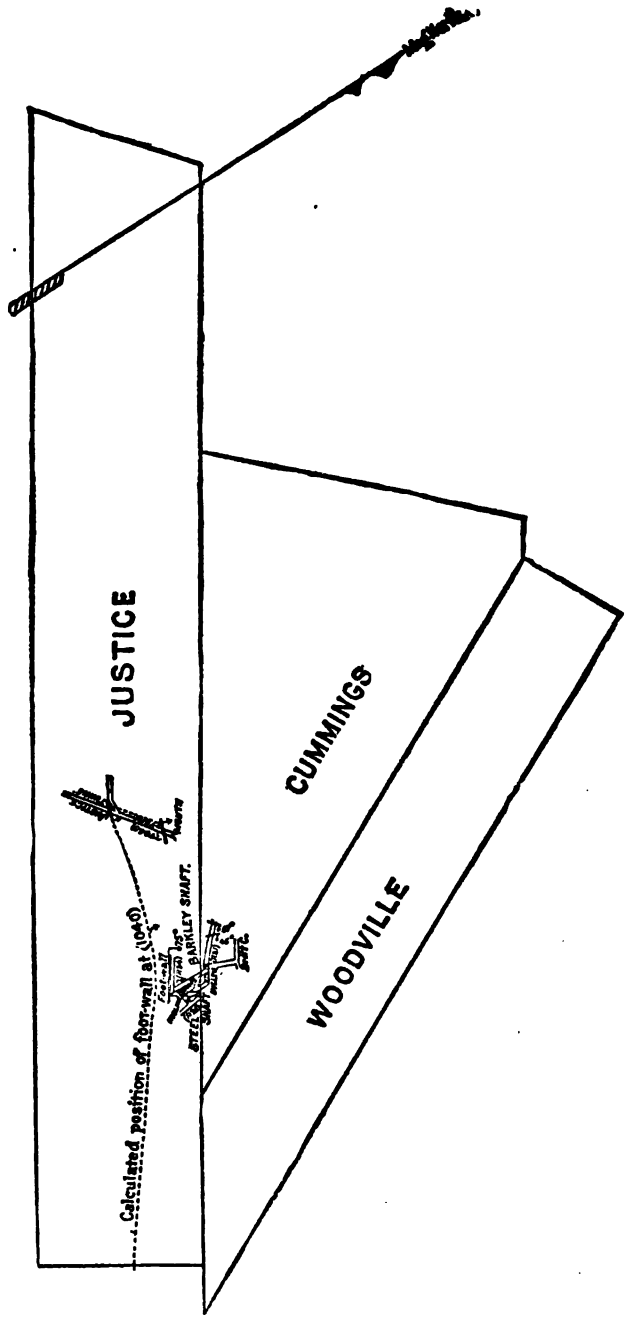
This is a suit in equity by the Justice Mining Company against John Barclay and others to enjoin the working of a certain mine, situated in the Gold Hill mining district, in Storey county, Nev.

W. E. F. DEAL, for complainant.

ALFRED CHARTZ, for respondents.

HAWLEY, District Judge. This is a suit in equity, brought by complainant, to enjoin the respondents from mining, extracting, or removing any quartz rock, earth, or ore from certain mining ground claimed by complainant, situate in the Gold Hill mining district, Storey county, Nev. The complainant is the owner of the Justice patented ground and lode, and of the Woodville patented ground and lode, the surface boundaries of which are delineated upon the following diagram (page 70).

The title of complainant to both of these claims as patented is admitted by the respondents, but they deny that either of said lodes includes any part of the mining ground, lode, claim, or premises lying between the easterly side line of the Justice patented claim and the westerly side line of the Woodville patented claim. On April 27, 1895, complainant leased to George Hobart, Charles H. Steele, and respondents Thomas Bell and C. Benham, for the period of one year, the mining ground "commencing at the trestle leading from the Justice Company's tunnel to the Washoe Mill, and running thence in a southerly direction, following the course of Gold cañon, to the south boundary line of the Justice claim, and extending from the line of the Devil's Gate toll road easterly to the east line of said Justice Mining Company's claim," upon an agreed royalty or percentage of the value of ore extracted. Steele and Hobart testified that, after the lease was executed, the superintendent of the Justice informed them that they could work as far east as the Justice claimed, or


JUSTICE
CUMMINGS
WOODVILLE
Calculated position of foot-wall at 1040
BARKLEY SHAFT.

as far east as they pleased. Respondents Bell and Benham testified that the lease was only intended for the main Justice lode within the Justice patented lines. The respondents on January 1, 1896, located certain mining ground, described in the answer as follows:

"Beginning at post No. 1 on the east side line of the mining claim and premises first described in plaintiff's bill of complaint, being what was formerly known as the Justice Independent claim, U. S. survey No. 48, but now known as the Justice claim, from which post No. 7 of the Justice Independent claim bears south, 47° east, 307.1 feet distant; thence, for the first course, north, 41° west, 636.9 feet, to post No. 2, identical with post No. 6 of the U. S. survey No. 48; thence, second course, north, 49° east, 382.7 feet, to post marked No. 3; thence, third course, along the west line of said Woodville claim, south 10° east, 743 feet, to the place of beginning—which said last described mining claim and premises is known as and called the Hills Gold and Silver Quartz Mine."

This ground is situate within the triangle shown on the diagram between the Justice and Woodville side lines.

The real contention on the part of the complainant is that the lode located by the respondents has its apex within the patented lines of the Justice claim, and extends downward vertically, entering into the adjoining land located by the respondents. The same contention is made with reference to the Woodville, the theory being that there is but one lode, known as and called the "Comstock Lode." The contention of the respondents is that the Hills Gold and Silver Quartz Mine is upon a separate and independent lode, well defined, between foot and hanging walls, having its apex outside of the surface limits of either the Justice or Woodville patented ground, and solely within the ground located by respondents. This is the principal and most important question in controversy, and upon which there is a decided conflict in the testimony.

It would serve no useful purpose to give the substance of the testimony as to the theory of the witnesses, with the facts

upon which their conclusions are based. In all controversies concerning the identity of ore bodies found on different levels at various depths beneath the surface, there is always room for a wide divergence of opinion among men of equal credit and experience as miners. The absolute truth is often difficult to ascertain, except in cases where connections are made between the different bodies of ore found on the different levels; and even then there is often room for controversies unless absolute continuity of vein matter is found, until expensive explorations are made, for the continuity of ore may be broken by the injection of country rock into the vein, or what is known among miners as a "horse" is found, which is not always easily distinguished from the actual walls of country rock. One witness, upon a careful inspection, may be of the opinion that it is the hanging or foot wall of the lode; while another, from his examination, gives it as his opinion that it is simply a horse, and that further exploration will develop the fact that the different bodies of ore are upon the same vein. A wide latitude is always permissible for the purpose of ascertaining the reasoning upon which the conclusions of witnesses are based, as well as their general knowledge of the ground, their experience and observation, and their qualifications as practical miners or experts, derived from years of experience in the particular district where the ore bodies in question are found. *Mining Co.* v. *Corcoran,* 15 Nev. 153; *Book* v. *Mining Co.,* 58 Fed. 106, 111, 120, 126; *Con. Wyoming M. Co.* v. *Champion M. Co.,* 63 Fed. 540, 544. Courts, however, are always inclined to give heed to the actual facts which have been ascertained from the workings at different points on the ground in dispute, and especially at the places where it is claimed on one side and denied by the other that the ore bodies unite. Upon this branch of the case a brief abstract of the testimony is filed herewith, giving a fair outline, in the language of the witnesses, as to their conclusions in relation to the develop-

ments actually made in the Steele shaft and in the Hills or Barclay shaft, and the various levels, tunnels, drifts, and inclines connected therewith, and the character of rock, earth, and ore found therein, and particularly upon the point whether the ore found in the ground covered by the Hills location is connected with, and forms a part of, the main Justice lode, which has its apex within the patented ground of the Justice, or is separated therefrom, and belongs to an independent vein or lode, having its apex within the limits of the Hills location, to which reference will hereafter be made.

In support of complainant's right to recover herein, it is alleged in the bill that complainant is the owner of, in possession of, and entitled to the possession of, the mining ground, claim, real estate, and premises lying between the easterly side line of the Justice patented ground and the westerly side line of the Woodville patented ground, together with all the veins of gold and silver bearing quartz rock, the apexes of which are within the surface boundaries of said claim, with the right to follow such veins or lodes to any depth; that while the respondents Charles Benham and Thomas Bell were in possession of and working on the lode within the Justice ground, as tenants of complainant, the other respondents herein, on January 1, 1896, conspired with them, and made a pretended location of a portion of said ground between the Justice and Woodville patented locations in the name of W. P. Hills, but for the use and benefit of the other respondents; that, when said location was made by W. P. Hills, the respondents Benham and Bell were in actual possession of said ground and vein as tenants of complainant, and were working the same for the purpose of complying with the laws of congress with reference to holding, possessing, and working mining claims; and that complainant had every year up to January 1, 1896, done and performed more than $100 worth of work for the purpose of holding

and possessing said claim, in accordance and compliance with the provisions of the act of congress in regard thereto. The title of complainant to the particular piece of ground in controversy, independent of any rights it may have by virtue of its ownership in the Justice and Woodville patented ground, is derived from the mining location made by A. Cummings on the 19th of March, 1875, which included in its description all the ground embraced in the location of the Hills Gold and Silver Quartz Mine. This mining ground was on April 12, 1875, conveyed by deed to the Woodville Con. S. M. Company. In July, 1880, the complainant acquired title to all the mining property of the Woodville Con. S. M. Company, including, among others, the Cummings claim. At this time S. T. Curtiss was the superintendent of the complainant, and upon the trial hereof testified that he went upon the ground, and took possession of all the property, including the Cummings claim; that he received a tracing from the company's office in San Francisco of all the claims; that he took the tracing, went upon the ground, and found a great many of the old monuments and stakes. It is claimed by complainant that from that time up to January 1, 1896, when the Hills location was made, it continued to remain in the possession of the ground located by Cummings, and that its possession was open and notorious.

It is shown that respondents, at the time of, or soon after, the Hills location was made, were notified of complainant's claim to the ground, and that they would be held responsible for any damage which they might commit. No work was ever done by the complainant within the surface lines of the Cummings location. But it claims to have expended during the year 1895 over $3,000 for the purpose of holding the Cummings and six other claims, to which it has title. This claim is partly based upon the theory that, inasmuch as the Cummings claim is contiguous to the Jus-

tice, work done upon the Justice within its patented lines would inure to the benefit of the Cummings, and constitute compliance with the provisions of the law requiring a certain amount of work upon unpatented claims to be performed every year; and, further, upon the ground that certain work performed by some of the respondents as lessees of complainant was for the purpose of saving it "a cash expenditure of money for the purpose of assessment on the different claims," including the Cummings; and that this was the principal object of making the lease. It is not claimed that the notice of location of the Cummings claim, as recorded, is not sufficiently descriptive to enable any one to ascertain therefrom what particular ground was claimed thereby. The objection urged against this location is that no evidence was offered that A. Cummings ever made the location, posted the notice, or put any stakes upon the ground, or that he or his grantees or predecessors in interest ever complied with the law requiring annual assessment work to be done upon the location; that the ground was abandoned; that, if not abandoned, it was forfeited; that it was claimed by other parties who had regularly located the ground prior to 1895, but who failed to do the assessment work in 1895; and that the ground was therefore subject to relocation on January 1, 1896, when the Hills location was made. It appears from the evidence that some five or six locations were made at the same time, or about the same time, as the Cummings, all being in proximity with each other. The plain inference to be drawn from all the testimony is that these locations were made at the instance and request and for the use and benefit of the Woodville Company, evidently for the purpose of protecting the Woodville claim. The natural presumption to be drawn from the testimony is that, at the time, the lode or vein, or lodes or veins, if more than one, had not been clearly defined; the explorations and developments that had been made were not sufficient to actually

determine whether certain seams of ore which were found in different places constituted different lodes or veins, or were in fact but parts of one lode; and that future workings would demonstrate this to be a fact by absolute continuity and connection of the ore bodies. It is not shown that any work was done by the Woodville Company on any of the six claims independent of the work that was being conducted and carried on by it within the surface limits of the Woodville patented claim. Owing to controversies which thereafter arose between the Justice and the Woodville as to whether both claims were not upon the same lode, or from other causes, the Woodville Company became involved, and all its property, including the Cummings ground, was sold under execution, and the Justice Company thereafter obtained the title to all the property. The Justice never performed any work upon the ground within the surface limits of the Cummings location, or any work for its benefit, save such as was performed in the regular course of work upon the Justice lode within the surface limits of the Justice patented claim. It had a watchman employed to look after its property, including the Justice, Cummings, and Woodville claims, and always asserted and claimed all the ground embraced in said locations and others not involved in this controversy.

It is a well-settled principle of law that abandonment of property is always a question of intention. It is a voluntary act. The property in question was never abandoned by complainant. It always asserted a claim to the ground. There is no evidence in the record which indicates any intention on its part to give up its right to this particular ground. Forfeiture may occur by failure to comply with some positive requirement of the statute, or of the mining rules or regulations, if the statute or rules provide that such failure shall work a forfeiture of the claim. Forfeitures, however, are not, as a general rule, favored by the law. A forfeiture of a mining claim cannot be established except upon clear and

convincing proof of the failure of the owners of the claim to have the work done or improvements made to the amount required by law. *Hammer* v. *Milling Co.*, 130 U. S. 291, 301, 9 Sup. Ct. 548. Conceding, for the purpose of this opinion, that complainant had failed to do any assessment work upon the ground, and that it was prior to January 1, 1895, subject to be relocated, still the respondents are not in a position to take any advantage of such failure on the part of the complainant to do the assessment work. The evidence is direct and positive that the object of the lease, as executed by complainant, was for the express purpose of performing enough work to hold the Cummings and the other claims lying outside of the patented lines of the Justice and Woodville. This testimony, although criticised and questioned by respondents' counsel, is undisputed. If true, it was sufficient to prevent the respondents from making any valid location in January, 1896. The assessment work by complainant in 1895, prior to the relocation of the grounds by Hills, on behalf of the respondents, and before any intervening rights by other parties had been acquired, revived its rights under the Cummings location; and the ground embraced in the Cummings claim could not therefore be considered as forfeited at the time Hills entered upon the ground, and made the location of the Hills Gold and Silver Quartz Mine.

The language of section 2324, Rev. St., is clear, plain, and explicit upon this point. After stating the amount of work that must be annually performed on each claim, it reads as follows:

"But, where such claims are held in common, such expenditure may be made upon any one claim; and, upon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made, provided that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure, and before such location."

North Noonday M. Co. v. *Orient M. Co.*, 1 Fed. 522, 539; *Jupiter M. Co.* v. *Bodie M. Co.*, 11 Fed. 668, 681; *Lakin* v. *Mining Co.*, 25 Fed. 337, 343; *Mining Co.* v. *Deferrari*, 62 Cal. 160, 163; *Gregory* v. *Pershbaker*, 73 Cal. 109, 119, 14 Pac. 401; *Pharis* v. *Muldoon*, 75 Cal. 284, 17 Pac. 70; *Belk* v. *Meagher*, 104 U. S. 279, 282.

In order to comply with the law, it was not necessary that the assessment work should be done upon the surface of the claim. It may be done on the surface or beneath the surface, and this would be sufficient although it might be that the work was performed on a lode having its apex outside of such surface lines. *Mining Co.* v. *Callison*, 5 Sawy. 439, 456, Fed. Cas. No. 9,886. It may be done on other claims or upon other ground, where, as here, it is in reasonable proximity to it; and if the work, as done, would be beneficial and tend to the future development or improvement of the claims, it is sufficient. *Doherty* v. *Morris*, 17 Colo. 105, 28 Pac. 85; *U. S.* v. *Iron Silver M. Co.*, 24 Fed. 568. It has always been held by the supreme court that, when several adjoining claims to mineral lands are held in common, work for the benefit of all done upon any one of them in a given year to an amount equal to that required to be done upon all in that year meets the requirements of section 2324, Rev. St. *Smelting Co.* v. *Kemp*, 104 U. S. 636, 655; *Jackson* v. *Roby*, 109 U. S. 440, 3 Sup. Ct. 301; *Chambers* v. *Harrington*, 111 U. S. 350, 4 Sup. Ct. 428; *Book* v. *Mining Co.*, 58 Fed. 106, 117; *Royston* v. *Miller*, 76 Fed. 50, 52; *Eberle* v. *Carmichael* (N. M.) 42 Pac. 95. In *Smelting Co.* v. *Kemp* the court said:

"Labor and improvements, within the meaning of the statute, are deemed to have been had on a mining claim, whether it consists of one location or several, when the labor is performed or the improvements are made for its development,—that is, to facilitate the extraction of the metals it may contain,—though in fact such labor and improvements may be on ground which originally constituted only one of the locations, as in sinking a shaft, or be at a distance from

the claim itself, as where the labor is performed for the turning of a stream, or the introduction of water, or where the improvement consists in the construction of a flume to carry off the debris or waste material. It would be absurd to require a shaft to be sunk on each location in a consolidated claim, when one shaft would suffice for all the locations."

Some questions are suggested in respondents' brief as to whether the work performed within the patented lines of the Justice could be "harnessed on" to the rule that work might be sufficient if performed in a tunnel run for the purpose of developing a mine, etc. Where the work is not done within the surface boundaries of the location, the law undoubtedly casts the burden upon the party claiming to have done the work, not only to show that the work done outside of such boundary was intended as the annual assessment work on the claim, but that it was of such a character as that it would inure to the benefit of such claim. But, when such facts are clearly established, then it is wholly immaterial whether the work to accomplish such purpose was performed off the ground upon a patented or unpatented mining claim. *Hall* v. *Kearny,* 18 Colo. 505, 509, 33 Pac. 373. The fact that the stakes and monuments, as designated in the notice and shown in the tracings, as seen by Curtis when he took possession of the Cummings ground for the Justice, were not visible at the time of the location of the Hills claim, does not vitiate the Cummings location, if the law in all other essential respects has been complied with. *Book* v. *Mining Co.,* 58 Fed. 106, 114. The fact that the "Leermo" and "Quinn" locations had been made within the surface boundaries of the Cummings prior to 1895 did not defeat complainant's title to the Cummings. If either of said locations were valid, the respondents would have no standing in court. They do not claim any rights under either of these locations. The proof is that both locations were either forfeited or abandoned, and the evidence in regard to these locations was only admissible

as tending to support the theory of the respondents that the triangular space of ground between the Justice and Woodville patented lines was generally considered by the miners as locatable ground, and that respondents, acting upon that belief, were not conspirators, acting in bad faith in making the Hills location.

With reference to complainant's right to the Cummings claim, still treating it to be upon a separate and independent vein from the Woodville and the Justice there still remains the further question whether the complainant has or has not been in the actual possession of the ground since it acquired title thereto, and was in the actual possession thereof at the time the Hills claim was located. This matter has been incidentally referred to simply to show that complainant had not abandoned the ground, and that it was at all times asserting its rights to and claim of the ground in dispute. Was this a mere bald assertion, a sham, a pretense without any right, a mere bugbear to frighten off all comers? Or was it acting in good faith, under color of right, in the honest belief that it was the owner of the ground? Its asserted claim was made at all times, whenever, wherever, or by whom attacked. The Quinn location was made in July, 1891. John O'Toole, who was interested therein, testified as to what occurred when he and Mr. Quinn commenced work on the location. He said:

"At that time Charles Lyons was superintendent of the Justice, and Charles Lyons notified us that that ground belonged to the Justice, and we told him that we did not think it did, and he said, if we took anything out, he would attach it; and we took out some ore, not a great deal, and we got a little behind, and had no money to do further work, and Lyons was making it kind of interesting, and we thought we had better leave it go, and we quit. We worked until some time in August, I believe, and we quit; and the ore that was there, we left it in the creek, and a freshet came along, and washed it away, and we never got anything out of it. Q. What occurred that made you leave the place? A. It was simply through Lyons talking to us, and telling us that we could not hold it. * * * Mr.

Lyons simply told me the ground belonged to the Justice Company, and if we worked it, and took anything out, he would take it from us."

Altoona Q. M. Co. v. *Integral Q. M. Co.* (Cal.) 45 Pac. 1047, 1049, is cited by respondents as establishing the proposition that:

"If there was only the naked claim to be looked after, and a watchman were placed there merely to warn prospectors, and thus prevent a relocation, it would not be labor upon the mine, in the sense of the statute."

It is shown, however, that the complainant performed the necessary amount of work in 1895. The presence of the watchman shows, or tends to show, the actual possession of the ground by complainant, and that such possession was open and notorious.

These results, as to the acts of the complainant and its good faith with reference to its ownership of the ground embraced in the Cummings claim, taken in connection with all the circumstances under which respondents Bell and Benham took the lease, coupled, as it must be, with the further condition that, while working under the lease as tenants of complainant, they discovered the ore body in dispute, lead to the conclusion that complainant has established a better right and superior title to the mining ground in question than the respondents. But the judgment in this case need not be based solely upon this ground. The same result would probably be reached upon the theory that there is but one vein or lode within the Justice or Woodville patented lines, and that the ore extracted by the respondents was from that lode. But, be that as it may, after a careful review and consideration of all the evidence, I am clearly of opinion that the decided weight and preponderance of evidence upon the facts, shown by the developments as made in the Steele shaft and the Hills or Barclay shaft, with the different levels, tun-

nels, drifts and inclines connected therewith, is to the effect that the ore body, seam, or vein disclosed in respondents' workings is a part of, and is connected in vein matter with, the Justice lode, having its apex within the patented lines of the Justice. Let a decree be drawn in favor of complainant, in accordance with the views herein expressed.

BONNER ET AL. v. MEIKLE ET AL.

(82 Federal 697. Circuit Court, District of Nevada. September 20, 1897.)

Where plaintiff is in possession a bill in equity is the proper suit to support an adverse claim.

[1]**Town lot may adverse lode application.** Occupants of lots in a town located on public lands of the United States, who have built on and improved the same, have a possessory right, which entitles them to contest the issuance of a patent to the claimant of a mining location covering such lots, though neither they nor the authorities of the town have taken any steps to secure title to themselves.

[2]**Lode must have workable value.** To entitle an applicant to a patent for a mining claim, as against occupants who have improved lots situated within its limits, claiming under the town-site act, it must be shown that at the time the town-site claimants acquired or purchased the lots the land was known to contain mineral of such extent and value as to justify expenditures for the purpose of extracting it. This rule applies though the town-site claimants have taken no steps to obtain title.

B. SANDERS and O. W. POWERS, for complainants.

HENRY RIVES and ROBERT M. CLARKE, for defendants.

[1]A mining claim need not adverse a town site patent application. The statute excepts it from the title passing by the patent. *Silver Bow Co.* v. *Clark*, 5 Mont. 378; 5 Pac. 570. *Talbott* v. *King*, 6 Mont. 76; 9 Pac. 434. *Butte City Smokehouse Lode Cases*, 6 Mont. 397; 12 Pac. 858. *Moyle* v. *Bullene*, 7 Colo. App. 308; 44 Pac. 69.

A town site may be entered on mineral land, the statute protecting prior mineral discoveries. *Deffeback* v. *Hawke*, 115 U. S. 392.

Town site patent cannot be attacked by one whose mineral rights did not exist before it issued. *Carter* v. *Thompson*, 18 M. R. 134. The mineral right may be lost by laches. *Horsky* v. *Moran*, 21 Mont. 345; 53 Pac. 1064.

Between town lot and mining claim the first in time takes title. *Tombstone T. S. Cases*, (Ariz.) 15 Pac. 26. *Blackmore* v. *Reilly*, (Ariz.), 17 Pac. 72.

[2]*Regan* v. *Whittaker*, 14 S. Dak. 373; 85 N. W. 863. *Larned* v. *Jenkins*, 113 Fed. 634. *Davis* v. *Weibbold*, 139 U. S. 507.

HAWLEY, District Judge (orally). This suit was brought in the state court by complainant Bonner on behalf of himself and for the benefit of numerous other persons upon a protest made by complainants to an application made by defendants for a patent to the Naid Queen mining location at De Lamar, Lincoln county, Nev., and upon the petition of one of the defendants was removed to this court upon the ground of prejudice and local influence. *Bonner* v. *Meikle*, 77 Fed. 485. Some question was made in the oral argument of counsel as to the character of this suit. It was instituted under and by virtue of and in compliance with the provisions of section 2326, Rev. St., which provide as follows:

"Where an adverse claim is filed during the period of publication, it shall be upon oath of the person or persons making the same, and shall show the nature, boundaries, and extent of such adverse claim, and all proceedings, except the publication of notice and making and filing of the affidavit thereof, shall be stayed until the controversy shall have been settled or decided by a court of competent jurisdiction, or the adverse claim waived. It shall be the duty of the adverse claimant, within thirty days after filing his claim, to commence proceedings in a court of competent jurisdiction, to determine the question of the right of possession, and prosecute the same with reasonable diligence to final judgment; and a failure so to do shall be a waiver of his adverse claim."

In such suits, as is said in *Perego* v. *Dodge*, 163 U. S. 160, 165, 16 Sup. Ct. 971, 973:

"The determination of the right of possession as between the parties is referred to a court of competent jurisdiction in aid of the land office, but the form of action is not provided for by the statute; and

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There must be an existing paying mine to base an exception to the town site granted. *Smith* v. *Hill*, 89 Cal. 122; 26 Pac. 644.

Sufficiency of allegations in plea of mineral quality of lot adversely held by surface claimant. *O'Keefe* v. *Cannon*, 52 Fed. 898.

A lode once profitably worked and then abandoned is not excepted from the patent although after a town site patent issues it is found to be still valuable. *Dower* v. *Richards*, 17 M. R. 704.

apparently an action at law or a suit in equity would lie, as either might be appropriate under the particular circumstances,—an action to recover possession when plaintiff is out of possession, and a suit to quiet title when he is in possession."

This suit comes within the latter class. The cause was tried before the court, a stipulation having been filed waiving a jury. The ground in controversy is situate upon the unsurveyed public lands of the United States. The complainants are the owners of, and in possession of, certain town lots, and the buildings erected thereon, in the town of De Lamar, situate within the surface limits of the location of the Naid Queen claim. They have expended over $30,000 in the construction of buildings and making improvements on their land. The notice of the mining location was posted on the ground prior to the entry of complainants upon the land. At the time the notice was posted, no discovery had been made of any mineral-bearing lode or vein within the limits of the location. Section 2320, Rev. St., provides that "no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located." The contention of complainants is that no such discovery has ever been made, but, in any event, that no such discovery was made until long after the rights of complainants had been acquired. In *Enterprise M. Co.*, v. *Rico-Aspen M. Co.*, 167 U. S. 108, 112, 17 Sup. Ct. 762, 763, the court said:

"In order to make a location, there must be a discovery; at least that is the general rule laid down in the statute. * * * The discovery in the tunnel is like a discovery on the surface. Until one is made, there is no right to locate a claim in respect to the vein, and the time to determine where and how it shall be located arises only upon the discovery, whether such discovery be made on the surface or in the tunnel."

This suit involves a question of fact. If a mineral lode or vein was discovered within the limits of the Naid Queen sur-

face location, running in a parallel direction with the side lines of the location, prior to the entry of complainants upon the town lots, the defendants are entitled to a patent. Was such a discovery made prior to that time? A preliminary objection was urged by defendants' counsel to any consideration of the merits of this case upon the ground that complainants have no standing in court; that they have not established any right to the premises in controversy; and are not, therefore, entitled to protest against the application of defendants for a patent to the Naid Queen mining location, because there had been no action taken by the citizens of the town of De Lamar to obtain title from the United States to the town site. To quote from the argument of counsel: The testimony "does not show that the public authorities have ever made application for it. It does not show that any steps have been taken to comply with the laws of the United States on the part of the complainants, or to acquire by purchase or otherwise from the United States the title which is alleged to be outstanding in the government; nor is there anything in the case that shows that this complainant, or those whom he represents, have now or expect to obtain this title, or that they have taken any steps to connect themselves with the government of the United States." It is true that such steps might have been taken by the town authorities, if it has any town organization, or by complainants, to secure title from the government to the land occupied by them; but the fact that no such steps have been taken does not deprive the property owners of the town, or any or either of them, from protesting against the application of the defendants for a patent to the Naid Queen location, which includes the property which they claim to own. The citizens of a town have as much right to build houses upon the public domain in which to live as others have to locate mining claims upon which to work. One purpose is as necessary as the other. Both are entitled to the equal protection of the law. Although complainants have not con-

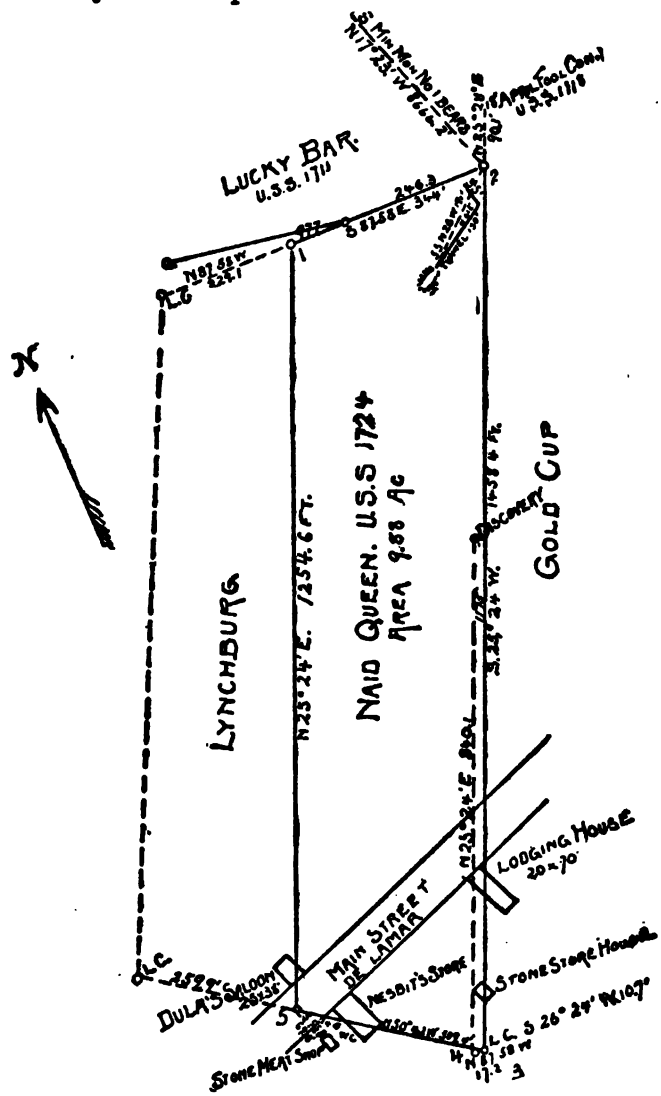
nected themselves with any government title, nor sought in any manner to secure such title, yet they have such a possessory right to the land upon which their buildings have been erected as will prevent others, not having any title from the government, from entering thereon, and taking their property from them, without first establishing a superior right thereto.

There are many cases where the owners of mining ground valued at millions of dollars have preferred to hold the same under "a mere possessory right" rather than to take any steps to secure a patent from the government. *Forbes* v. *Gracey,* 94 U. S. 762, 767. Would it not be absurd to claim that in such cases the owners of the possessory title, under valid mining locations, were not entitled to any protection, and could not even protest against the application of some subsequent locator for a patent covering a portion or all of their ground because they had never taken any steps to secure title to their property from the United States? The argument of counsel would have merit if the complainants were seeking to set aside a patent that had been issued by the United States to the owners of the Naid Queen location. Being simply occupants of and in possession of town lots on the public lands without title, they have no vested rights to this land as against the United States nor any purchaser from them. *Sparks* v. *Pierce,* 115 U. S. 408, 6 Sup. Ct. 102. But that is not this case. The defendants have no title from the United States. They are not in any better position in this respect than the complainants. It is true that they are seeking to procure the government title; but, in order to obtain a patent, they must first prove that they have a better right to the land than the complainants. The case must be considered upon its merits.

A mass of testimony has been introduced tending to show that the entire country in and around the town of De Lamar is one mineralized zone or belt about 5 miles long and 1½ miles wide, in which over 200 mining locations have been

made; that the Naid Queen is within this mineralized zone; that it is entirely surrounded by other mining locations, in each of which more or less mineral has been found; that the general course of the fractures found in this belt, upon the sides of which the paying rock is usually found, is northeast and southwest. The formation of this zone or mineral belt of country is quartzite, and the pay ore or mineral rock is largely composed of, or is found in, this quartzite. It is difficult to tell by merely looking at the quartzite whether it contains mineral or not. There are specimens occasionally found where more or less quartz is plainly to be seen, clearly indicating that it contains gold in paying quantities; other specimens have copper stains and other marks peculiar to mineral-bearing rock; but the greater portion of the rock that is milled is of such a character that it is exceedingly difficult, if not impossible, even for experienced miners, thoroughly acquainted with this district, to tell the mineral-paying quartzite from the quartzite which does not contain sufficient mineral to pay for extracting and milling. It is necessary to have assays made in every section of the timbered ground in order to ascertain whether or not the quartzite therein contains mineral in sufficient quantities to justify its being sent to the mill for reduction. Owing to these peculiar characteristics, as well as of the exciting conditions found in all new mining camps upon the discovery of rich ore, it can readily be understood why all the ground in the mineral belt or region of country where the quartzite was found was located upon a claimed lode, whether any valuable mineral was found therein or not. The notice of location of the Naid Queen was posted on the ground April 14, 1892. At that time there were no houses or buildings of any kind upon the surface ground included within the limits of the Naid Queen location. The first cabin built within the town site of De Lamar was constructed in the fall or winter of 1893. The first buildings erected upon the ground in controversy were put up in the spring of 1894. Quite a number of buildings were con-

structed that year; others in 1895. The town is built in a gulch. The following diagram shows the location of the ground as shown by the survey made by the United States mineral surveyor in the application made by the owners of the Naid Queen for a patent.



There was some work on the extreme northerly end of the Naid Queen location done in the fall of 1893,—a little cut 5 or 6 feet long and 2 feet deep on the croppings, and another small cut or prospect hole about the north end of the tunnel, found on the diagram. The cut at the croppings was enlarged in 1894. It was made a little deeper, and extended in length to about 16 or 18 feet, and in the deepest place was about 6 feet. The tunnel was started in April, 1895. The following assays of samples of rock found in the tunnel were made by the assayer of the De Lamar Company:

"Naid Queen Samples.

"No. 1. From door of tunnel E. 12 feet, sides and top; value, trace. No. 2. 2nd 12 feet E. of No. 1, sides and top; value, trace. No. 3. 1st 6 feet of 3rd 12 feet E. of No. 1, sides and top; value, trace. No. 4. 4th 12 feet east, sides and top; value, trace. No. 5. 5th 12 feet east, sides and top; value, trace. No. 6. 6th 12 feet east, sides and top; value, trace. No. 7. 7th 12 feet E., sides and top; value, trace. No. 8. 8th 12 feet E., sides and top; value, trace. No. 9. 9th 12 feet E., sides only; value trace. No. 10. Distance from crosscut to face of tunnel (10'), sides, top, and face; value, trace. No. 11. About 40 feet east of door of tunnel on south side of tunnel; value, $.46. No. 12. About 70 feet east of No. 11 in a winze in south crosscut; value, $4.82. No. 13. South side of winze in south crosscut; value, $.68. No. 14. Face of north crosscut about 50 feet north of No. 13; value, trace. No. 15. 13 feet south of No. 14 on west side north crosscut; value, $1.14. No. 16. 6 feet south of No. 15, west side of north crosscut; value, $.70. No. 17. Intersection of west side of north crosscut and north side of main tunnel; value, trace. No. 18. Roof of tunnel at its intersection with crosscut; value, $4.22. Above samples were taken on or about March 7, 1897, and were made in duplicate, and checked.

"Oscar Lachmund,
"Assayer for De Lamar Nevada G. Mg. Co., De Lamar, Nevada."

From the testimony it appears that assays No. 12 and No. 18 were in fact taken over the easterly side line of the Naid Queen. It is admitted by the defendants that no ore or rock containing mineral was ever found at or near the point of "discovery" marked on the diagram. The testimony shows

that nothing more than a trace was found in the tunnel for a distance of 108 feet from the mouth. The length of the tunnel is 130 feet. All the samples were taken at the northeast corner of the Naid Queen location. There is no testimony tending to show the discovery of any mineralized rock of any value in any other portion of the Naid Queen location. The points where the assays were taken showing a trace are over 1,000 feet distant from the buildings claimed by the complainants. The opinions and beliefs of witnesses that, as depth is attained, quartzite containing valuable mineral would or might be found extending through the location of the Naid Queen from the north to the south end, is entirely theoretical and problematical. At present, none has been found except at the places above stated. The fact that pay ore has been found in the middle or northern portion of the Lucky Bar, immediately adjoining the Naid Queen on the north, and in the southerly end of the Richmond location, adjoining the Naid Queen on the south, is too remote to establish the fact that there is a continuity of ore extending from the one point to the other through the Naid Queen location. So, with reference to the quartzite in the Gold Cup on the easterly side of the Naid Queen, while some valuable specimens of rock are found, and some ore has been milled, still it is not shown that ore or rock of any value extends over and into the Naid Queen. At the northerly end of Jim Crow, which is situated adjoining and northwesterly from the Lynchburg, valuable rock containing mineral is found. To the west of Lucky Bar, in Jim Crow No. 1 and No. 2, paying ore is found; and to the north and northeast of the Lucky Bar, in Monitor No. 2 and April Fool, the quartzite is rich in mineral; and to the north of these last-named claims are the Millionaire, Monitor, Cliff, Swifter, and other valuable locations. From the testimony it appears that the richest locations are found in the hills surrounding the town; that, as you approach the base toward the gulch, the

values cease; and in the gulch, where the town of De Lamar is shown on the diagram, no mineral has been found.

Taking into consideration all the facts and circumstances testified to by the respective witnesses, and carefully weighing the same, it seems clear to my mind that, whatever the probabilities or improbabilities of the continuance of mineral bearing quartzite and rock in place through the Naid Queen lengthwise at the present time may be, there was not, at the time the complainants took up, purchased, or secured the town lots upon which their respective buildings are erected, any such discovery of mineral-bearing earth, rock, or ore within the limits of the Naid Queen location as would give to the owners of such location a prior right to the ground and premises occupied by the complainants herein. It must be borne in mind that this is not a contest between two mining companies, both claiming the ground as mineral land, and each claiming to be the first locator, or the first to discover rock in place bearing mineral. In all such cases the question as to what constitutes a discovery of a vein or lode under the provisions of section 2320, Rev. St., is governed by the rule announced in *Book* v. *Mining Co.*, 58 Fed. 106, 121, that, when a locator of a mining claim finds rock in place containing mineral in sufficient quantity to justify him in expending his time and money in prospecting and developing the claim, he has made a discovery, within the meaning of the statute, whether the rock or earth is rich or poor, whether it assays high or low, with this qualification: that the definition of a lode must always have special reference to the formation and peculiar characteristics of the particular district in which the lode or vein is found. This rule has always prevailed in the courts, as is clearly shown in the numerous authorities there cited. See, also, *McShane* v. *Kenkle* (Mont.), 44 Pac. 979, 981. Why? Because it was never intended that the courts should weigh scales to determine the value of the mineral found as between a prior and subsequent locator of a

mining claim on the same lode. But where the rights of claimants to a town-site, or to agricultural land, or as between the locators of a placer claim and others claiming a vein or lode to the same ground, are involved, other questions must be considered. In all such cases there are different statutes to be construed, and a somewhat different rule prevails. This is clearly stated by the court of appeals of this circuit in *Migeon* v. *Railway Co.*, 23 C. C. A. 156, 77 Fed. 249, 256. In a case of contest between mineral claimants on one side and parties holding town-site patents on the other the supreme court has repeatedly declared that under the acts of congress which govern such cases, in order to except mines or mineral lands from the operation of a town-site patent, it is not sufficient that the lands do in fact contain minerals, or even valuable minerals, when the town-site patent takes effect, but they must at that time be known to contain mineral of such extent and value as to justify expenditures for the purpose of extracting them; and, if the lands are not known at that time to be so valuable for mining purposes, the fact that they have once been valuable, or are afterwards discovered to be still valuable, for such purposes, does not defeat or impair the title of persons claiming under the town-site patent. *Deffeback* v. *Hawke*, 115 U. S. 393, 404, 6 Sup. Ct. 95; *Davis* v. *Weibbold*, 139 U. S. 507, 525, 11 Sup. Ct. 628; *Dower* v. *Richards*, 151 U. S. 658, 663, 14 Sup. Ct. 452. In *Davis* v. *Weibbold*, the court, after announcing the rule as above stated, said:

"In connection with these views it is to be borne in mind, also, that the object of the town-site act was to afford relief to the inhabitants of cities and towns upon the public lands by giving title to the lands occupied by them, and thus induce them to erect suitable buildings for residence and business. Under such protection many towns have grown up on lands which, previously to the patent, were part of the public domain of the United States, with buildings of great value for residence, trade and manufactures. It would, in many instances, be a great impediment to the progress of such towns

if the titles to the lots occupied by their inhabitants were subject to be overthrown by a subsequent discovery of mineral deposits under their surface. If their title would not protect them against a discovery of mines in them, neither would it protect them against the invasion of their property for the purpose of exploring for mines. The temptation to such exploration would be according to the suspected extent of the minerals, and, being thus subject to indiscriminate invasion, the land would be, to one having the title, poor and valueless, just in proportion to the supposed richness and abundance of its products. We do not think that any such results were contemplated by the act of congress, or that any construction should be given to the provision in question which would lead to such results."

I am of opinion that those cases, and the principles therein announced, are applicable to this case. It is true that no steps have even been taken by the town-site claimants of De Lamar to obtain a town-site patent in order to procure a title from the government. They might have done so; and, if they had, then the mineral claimants to the Naid Queen mining location could have protested, and the identical question here raised would then have been presented. The fact as to which party first applies for a patent certainly cannot make any difference in the principle which is involved.

It was argued by counsel for complainants that, if any discovery of a lode or vein was made in the Naid Queen location, it was a vein that ran in an easterly and westerly direction at the northerly end of the location. It was also claimed that the application for a patent by the defendants was not made in good faith for the purpose of procuring a patent to mining ground for mining purposes, but was an attempt to obtain a patent for the sole purpose of getting title to the town lots and buildings in possession of the complainants. It is undoubtedly true that in a case like the present, where complainants acted in the utmost good faith in locating upon or purchasing the town lots upon which their improvements are made, under the belief that the land was not mineral, their rights ought not to be disturbed without clear and satisfactory proof that within the limits of the mining location there had

been found a lode or vein which, in its natural course and direction, would give the owners thereof a right to all the surface ground within the limits of the location. In other words, if the proofs were undisputed that a discovery of a lode or vein had been found at the northerly end of the Naid Queen location; that from such discovery it clearly appeared that the course of the lode lengthwise was easterly and westerly, and at right angles within the side lines of the Naid Queen,—then, in the eye of the law, the side lines of the location as made upon the ground would become the end lines of the location (*King* v. *Mining Co.*, 152 U. S. 222, 228, 14 Sup. Ct. 510; *Last Chance M. Co.* v. *Tyler M. Co.*, 157 U. S. 683, 687, 15 Sup. Ct. 733), and the owners of the claim would only be entitled to a patent for 300 feet of surface ground on each side of the middle of the lode; and hence it would not interfere with complainants' rights. There is more or less testimony that tends to support that theory, but the views already expressed are decisive of the case, and render it unnecessary to decide other questions raised by counsel. The defendants are not entitled to a patent for any part or portion of the land claimed and occupied by the complainants. The complainants are entitled to judgment for their costs. Let a decree be entered accordingly.

[1]BYRNES ET AL. v. DOUGLASS ET AL.

(83 Federal 45. Circuit Court of Appeals, Ninth Circuit. October 4, 1897.)

[2]**Tunnel condemned by tunnel site.** Under the Nevada statute of March 1, 1875 (Gen. St. §§ 256-273), authorizing the condemnation of rights of way for mining tunnels, a mining company may condemn, for use in reaching its mine, an old and partially ruined tunnel in a neighboring claim, which is not used by the owners of that claim at the time, there being nothing to show any present purpose to use it.

Condemnation without payment of damages. The report of commissioners in condemnation proceedings under the Nevada statute, finding on conflicting evidence that no damage will be done by the construction of a tunnel through certain claims, and that such claims would rather be benefited thereby, will not be disturbed on appeal.

Appeal from the Circuit Court of the United States for the District of Nevada.

[1]S. C. below, 59 Fed. 29.

[2]A right of way for a mining tramway cannot be condemned in Colorado. *Peo.* v. *District Court*, 11 Colo. 147; 17 Pac. 298.

Coal Company cannot condemn land for tramway. *Sholl* v. *German C. Co.* 118 Ill. 428; 10 N. E. 199.

Right of way to mine through tunnel cannot be condemned. *Amador Q. Co.* v. *DeWitt*, 73 Cal. 482; 15 Pac. 74.

Irrigation purposes is a public use. *Lux* v. *Haggin*, 69 Cal. 255; 10 Pac. 674.

Condemnation of road to mines, upheld as a condemnation for public use; after road condemned, mine owner may transform it into a railroad. *Phillips* v. *Watson*, 63 Ia. 28; 18 N. W. 659.

Condemnation of land in aid of mining as a public use maintained and constitutionality of acts to such effect affirmed. *Overman Co.* v. *Corcoran*, 1 M. R. 691. *Dayton Co.* v. *Seawell*, 5 M. R. 424, *Contra*, *Cons. Channel Co.* v. *Cent. Pac. Co.* 5 M. R. 438.

A natural gas company to be entitled to condemn must show that it is furnishing gas to the public. The right to condemn is an easement only. *Great Western Co.* v. *Hawkins*, (Ind. App.) 66 N. E. 765

The right to condemn a pipe line does not give the company the

A proceeding was commenced by J. M. Douglass and others, the appellees in this case, in the district court of the state of Nevada, under a statute of that state, entitled "An act to encourage the mining, milling, smelting, or other reduction of ores in the state of Nevada," approved March 1, 1875 (St. 1875, p. 111; Gen. St. §§ 256-273), to condemn a right of way for a mining tunnel 7½ feet wide by 7½ feet high from the mine known as the "Contact Mine," through five intervening mining claims and locations, namely, the Atlantic, the Annie, the Red Jacket, the South End, and the Clinton, to the Goodman mine. The appellants removed the cause to the circuit court of the United States for the district of Nevada, and under said proceedings, in said circuit court commissioners were appointed to assess damages to the owners of the property appropriated to the use of said tunnel, and upon the report of said commissioners and the hearing of the objections of the appellants thereto the court confirmed the report, and entered and filed a decree appropriating to the use of the appellees the right of way through said mines, as applied for in the petition. The appellants appealed from said decree, and assign as error, first, that in and by said proceeding there was condemned to the use of the appellees a tunnel 648 feet in length, running through a portion of the Atlantic Consolidated mine, and having its mouth in the Contact mine, which tunnel belonged to and was a part of the Atlantic Consolidated mine, and was the most convenient means for working the same, and had been for many years used by the owners of the Atlantic Consolidated mine, and was not subject to condemnation under said act of the legisla-

right to construct a telephone as an appurtenance. *Woods* v. *Greensboro Co.* 204 Pa. 606; 54 Atl. 470.

The right to sink a coal pit on certain surface ground is property, for which the lessee is entitled to damages where the lessor sells such surface ground to a railroad. *In re Masters and Railway*, 2 K. B. (1901) 84.

ture of Nevada, for the reason that no authority is given by said act to condemn the tunnel of one person, constructed and used for mining purposes, for the use of another for the same purpose. The facts in regard to the tunnel which belonged to the Atlantic mining claim are these: The commissioners, in surveying a tunnel through the mining claims intervening between the Contact claim and the Goodman claim, followed and appropriated for a portion of the distance the tunnel so referred to in the assignment of error. A portion of that tunnel had been constructed in 1860 or 1861, for the purpose of furnishing water to Silver City. Subsequently its use for that purpose was abandoned, and as early as 1866 it was used for prospecting and working the Atlantic claim. It traversed the Atlantic claim, and had its mouth on an adjoining claim, which was first known as the "Cadiz Claim." The Cadiz claim and the Atlantic claim belonged originally to the same owners. They permitted the Cadiz location to revert to the United States, and it was subsequently relocated by others. In 1890 it was relocated by C. E. Brown, under the name of the "Contact Mine." The tunnel was used for mining purposes as late as the year 1877, or perhaps 1881. After that date no work appears to have been done in the tunnel, except to this extent: that in 1887, the tunnel being out of repair, an agent who was in possession of the Atlantic mine and tunnel on behalf or the owners began to repair the tunnel, but shortly afterwards, on consultation with the owners, appears to have abandoned it, for the reason that it was more feasible to construct a new tunnel than to repair the old. In 1887 he commenced the construction of a new tunnel. Since that date the old tunnel was not used, but was allowed to fall into decay. In their report the commissioners in these proceedings awarded to the owners of the tunnel, so far as the same was situate in the Atlantic mine, to wit, 349 feet, the sum of $1,021.95.

W. E. F. DEAL for appellants.

F. M. HUFFAKER, for appellees.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge, after stating the facts as above, delivered the opinion of the court.

It is the contention of the appellants that, under the act of the legislature of Nevada on which the proceedings in this case were had, the circuit court was powerless to take the tunnel belonging to the owners of one mine, and bestow it by right of eminent domain upon the owners of another. It appears from the evidence that when the appellees took possession of the right of way under the proceedings in this case the old tunnel was badly caved down, and in very bad shape, and that it cost nearly as much to clean it out as it would have cost to run a new tunnel. The statute under which these proceedings are had declares that "the production and reduction of ores are of vital necessity to the people of this state; are pursuits in which all are interested, and from which all derive a benefit; so the mining, milling, smelting, or other reduction of ores are hereby declared to be for the public use, and the right of eminent domain may be exercised therefor." Gen. St. Nev. § 256. In *Mining Co.* v. *Seawell,* 11 Nev. 394, it was held by the supreme court of that state that the condemnation of a right of way for a tunnel for the operation of a mine under the provisions of the statute in question was constitutional, and that the purpose for which the tunnel was to be appropriated was a public use. That decision was approved in the later case of *Mining Co.* v. *Corcoran,* 15 Nev. 147, and it undoubtedly declares the settled law of that state. Under the facts that appear in the record, and that were acted upon by the court in rendering the decree which is appealed

from, we deem it unnecessary to consider whether or not a mining tunnel which has been constructed and is in use by a mining corporation may, under the statute of Nevada, be taken from the company by which it is owned or used, and be devoted to the use of another mine. That question is not presented in this case. The tunnel of the Atlantic mine, which was appropriated by the appellees in those proceedings, had not been used for mining purposes for many years. It is true that it had not been abandoned, and that it still belonged to the Atlantic mine, and that the owners of that mine claimed it, and the right to use it; but the fact remains that they had not used it, and there was nothing in the record to show a present purpose to use it, for mining purposes. At the time when these proceedings were begun, therefore, it stood in the same relation to the property of the mining company in which any other of its property stood which was not being actually used for mining purposes. The right to condemn it by the exercise of eminent domain rested upon the principles which have controlled the decisions of courts in cases where the lands of railroad corporations, not actually in use by them, nor absolutely necessary for the enjoyment of their franchises, have been held subject to be taken by other corporations in the exercise of the right of eminent domain. *Peoria, P. & J. R. Co.* v. *Peoria & S. R. Co.,* 66 Ill. 174; In re *Rochester Water Com'rs,* 66 N. Y. 413; *New York, C. & H. R. R. Co.* v. *Metropolitan Gaslight Co.,* 63 N. Y. 326; *Morris Co.* v. *Central Co.,* 31 N. J. Law, 205. The commissioners in their report, and the court in its decree, evidently took this view of the relation of the old tunnel to the Atlantic mine.

The remaining assignments of error direct our attention to the fact that in the report of the commissioners and in the final decree no compensation whatever is allowed for that portion of the old tunnel which was located in the Contact mine, and no compensation was allowed for the right of way

through the mines which intervened between the Atlantic mine and the Goodman. The report of the commissioners was based upon conflicting testimony. Competent evidence was produced before them to prove that the old tunnel in the Contact mine and the right of way through the other mines were of no value, and that it was a benefit, rather than a disadvantage, to the intervening mines to develop their lodes by the tunnels which were cut through them, and that in all cases where ore of any value was taken it was placed upon the mining premises, and there left for the use of the owners. Under this state of the record, we cannot say that the fair and actual value of the property taken was not awarded, or that just compensation was not made. Every intendment is in favor of the correctness of the report of the commissioners. *Railroad Co.* v. *Elliott,* 5 Nev. 358. The decree will be affirmed, with costs to the appellees.

ANNIE A. WRIGHT ET AL. v. THE WARRIOR RUN COAL CO.

(182 Pennsylvania 514; 38 Atl. 491. Supreme Court. Oct. 11, 1897.)

[1]**Facts of the case. Acquiescence not estoppel.** By changes in the market demand for different sizes of coal, lessee was compelled to change from time to time the size in which he sold the coal and break lump into chestnut and other smaller sizes. The royalty was graded according to the sizes and the effect of these changes was to diminish the royalty. The lessor protested but continued to accept payments and gave his receipts: *Held*, that his successors in interest could not go back of settlements made by their ancestor but were not precluded from insisting on strict performance in the future.

Accepting royalties on lessee's construction and receipting for the same, at the same time insisting that his, the lessor's, construction was the correct one; does not bring the lessor under the rule that a party will be held to the interpretation placed by himself on a contract.

Market demand discarded. Where a lease provides for a graded royalty, based on sizes, it is to be construed as contemplating the mode of working and delivering the coal in use at the time and not as based on what might be the market demand during the life of the lease for larger or smaller sizes of coal. MITCHELL, J., dissenting.

Coal consumed by lessee. It is the custom not to charge royalty on coal used by the lessee under his own boilers.

Appeal from Court of Common Pleas, Luzerne County.

[1]Facts left to jury to decide whether or not the strict payment of rent has been waived. *Steiner* v. *Marks*, 18 M. R. 320.

Consideration as to whether coal royalties are the "income" of an estate. *Bedford's Appeal*, 126 Pa. 117; 17 Atl. 538.

A lease on royalty implies a covenant to work with reasonable diligence. *Sharp* v. *Behr*, 117 Fed. 864. *Guth's App.* (Pa.) 5 Atl. 728.

Where rent falls due on Sunday it may be legally tendered the following Monday. *Warne* v. *Wagenor*, (N. J.) 15 Atl. 307.

Plaintiff took stone from defendant's quarry and paid royalty in kind. It turned out that defendant had no title. Plaintiff cannot recover for the royalty paid, he not having been compelled to pay it to any one else. *Steele* v. *Sanchez*, 80 Iowa 507; 45 N. W. 870.

Contract between wire manufacturing company and natural gas

Bill by Annie A. Wright and others against the Warrior Run Coal Company to recover rent or royalty alleged to be due on a lease of coal land, for an account, and for an injunction. From a decree in favor of plaintiffs, defendant appeals. Modified.

SAMUEL DICKSON and ALEXANDER FARNHAM, for appellant.

GEORGE R. BEDFORD and H. W. PALMER, for appellees.

DEAN, J. On November 28th, 1864, by sealed agreement, Hendrick B. Wright, for himself and as guardian of his minor son, leased to Abel Barker and four others two adjoining tracts of land, one containing 125 acres, and the other 163 acres, in Hanover township, Luzerne county, for the purpose of mining coal thereunder, with privilege to farm the same, and also to cut timber therefrom to be used in their coal operations. The term was for 10 years, with the right to the lessees to an extension of 99 years at the end thereof. The consideration to be paid by the lessees is expressed in the following clause of the contract:

"The said party of the second part shall pay the party of the first part the following prices per ton for all coal mined

company, payment for the gas at so much per ton of iron produced: *Held* that the tonnage meant the finished product, not the raw material. *Peoples Co.* v. *Braddock Co.* 155 Pa. 22; 25 Atl. 749.

Construction of asphalt lease as to whether based on the crude rock worked or the liquid produced from the crude rock. *Higgins* v. *California Co.* 109 Cal. 304; 41 Pac. 1087.

Royalty divided where a lessee becomes a part owner. *Id.*

Construction of lease where payments are credited as future royalties. Rental is liquidated damages and not a penalty. *Cons. Coal Co.* v. *Peers*, 150 Ill. 344; 37 N. E. 937.

Lessee to pay at least so much per annum: Excess on early payments allowed to set off idle years. *Render* v. *McHenry Co.* 12 Ky. L. R. 571; 14 S. W. 678.

Where royalties are to be deducted from fixed rent they are to be

during the said term, the ton in all cases to be twenty-two hundred and forty pounds (2,240 lbs.) prepared coal. Chestnut coal to be half price; but coal shipped from the mines, which shall not have been prepared, shall not be subject to abatement because not prepared. For the first fifty thousand tons of coal mined in any one year, fifteen cents (15 cents) per ton; for the next twenty-five thousand tons in the same year, twelve cents (12 cents) per ton; and for any excess over and above seventy-five thousand tons in any one year of the term, ten cents (10 cents) per ton."

The royalties were to be paid quarterly, commencing with the date of the lease, and a stipulation for a minimum quarterly payment of not less than $1,250, the enforcement of the minimum payment, however, to commence only with the second year. It was further stipulated that, in case the term should be extended for 99 years, the extended term should be subject to all the conditions and covenants of the 10-years term, except that instead of the shifting scale of prices, determined by the quantity mined, the price should be "15 cents per ton for all quantities mined, chestnut coal, as hereinbefore stated, to be half price, or seven and one-half cents

credited against each installment. *Chase* v. *Knickerbocker Co.* 53 N. Y. S. 220.

Construction as to reimbursement from year to year on minimum royalties. *Smith* v. *Godfrey*, (Tenn.) 48 S. W. 303.

Covenant to produce a minimum of coal; lessee is liable for royalty on that amount whether mined or not. *Swan* v. *Brown*, 8 Kans. App. 505; 56 Pac. 141.

Computation of royalty where the mineral is divided into classes. *Harlan* v. *Central Co.* (Tenn.) 62 S. W. 614.

Account will lie to show what royalty is due. *Swearingen* v. *Steers*, 49 W. Va. 312; 38 S. E. 510.

Excess of royalties under old lease, no defense for short work under new lease. *Denniston* v. *Haddock*, 200 Pa. 426; 50 Atl. 197.

Parol evidence allowed to show that one of the lessors was not entitled to royalties. *Acklin* v. *McCalmont Co.* 201 Pa. 257; 50 Atl. 955.

No defense to rent that lessor was not sole owner. *Kunkle* v.

per ton." As a mining corporation by the lessees was contemplated, it was provided they should have power to assign such lease to the corporation. Acordingly, on the organization of this defendant corporation, about two months afterwards, the lease was assigned to it, and mining operations were commenced. From that date, January, 1865, until August 21, 1893, the defendant mined and shipped 1,460,760 tons. Plaintiffs admit that the defendant accounted and paid for 1,298,336 tons, but allege that the difference, 162,724 tons has not been paid for. This difference was made up of 156,400 tons of pea coal and 6,024 tons of buckwheat coal, shipped and sold during the later years of operations under the lease. In addition to these quantities shipped and sold and not paid for, defendant burned under its boilers, for steam purposes, 75,000 tons of large size coal, and 80,000 tons of pea and buckwheat coal.

The defendant having refused to pay for the pea and buckwheat coal shipped and sold, or for any coal used at the mine for steam purposes, plaintiffs filed this bill. The material complaints are:

Peo. N. G. Co. 18 M. R. 153. *Colo F. & I. Co.* v. *Pryor*, 25 Colo. 540; 19 M. R. 544.

Ouster by lessor is a defense to suit for royalties. *Pendill* v. *Eells*, 67 Mich. 657; 35 N. W. 754.

Where lessee agrees to pay rent unless he drives a well, plaintiff in suit to recover rent must show that no well was driven. *Missisinewa Co.* v. *Andrews*, 22 Ind. App. 523; 54 N. E. 146.

It may be shown by parol that lessor agreed to reduce the royalty called for in a written lease. *Crawford* v. *Bellevue Co.* 183 Pa. 227; 38 Atl. 595.

One who takes an oil lease conditioned to be void unless he do something in a certain time, but without covenants binding him to either pay or sink, has an implied right to abandon. *Glasgow* v. *Chartiers Oil Co.* 17 M. R. 523.

A lease, the consideration of which is royalty alone, will be set aside in equity if not worked. *Shenandoah Co.* v. *Hise*, 92 Va. 238; 23 S. E. 303. Or an abandonment will be presumed. *Hawkins* v. *Pepper*, 117 N. C. 407; 23 S. E. 434.

(1) That defendant has negligently and unskilfully mined the coal, so that the roof at places has fallen and thereby rendered inaccessible large quantities of coal in place, which are now lost to plaintiffs.

(2) That defendant, by changes in machinery and methods of preparing the coal for market, has largely increased the quantity of chestnut coal, for which the lower royalty is paid, and further, largely increased the quantity of pea and buckwheat coal, for which it denies its liability to pay any royalty.

(3) That defendant has refused to render proper and full accounts of the coal actually produced and sold on which royalties should be paid under a correct interpretation of the contract.

The prayers are:

(1) That defendant account for all coal rebroken for the purpose of increasing the product of chestnut and smaller sizes, and for the coal rendered unavailable by its negligent, unskilful, and improper mining, and also account for the whole product of the mines actually mined upon which it ought to have paid the stipulated royalty.

(2) That defendant be restrained from further mining operations on the premises until it pays or secures to be paid all sums of money due, or for which it is liable to the plaintiffs, and upon its failure to make payment or furnish such security during a reasonable time, to be determined by the court, then that the lease be declared forfeited, possession of the premises be decreed and awarded to the plaintiffs, and the defendant be enjoined from prosecuting its mining operations or interfering with the plaintiffs' possession or control of same.

The three averments of the bill, as stated, were denied by defendant, and the issue thus made up was heard by Hon. L. H. Bennett, as examiner and master; and he, before the ending of the hearing, having been elected judge of common pleas

of Luzerne county, by agreement of the parties in writing, continued both as master and judge of the court until final decree.

As to the first complaint, averring damage from negligent and unskilful mining, the master, on competent evidence, finds the facts against the plaintiffs; and we discover nothing in the evidence to warrant us in disturbing this finding, and further notice will not be taken of it in appeal by plaintiffs from same decree.

As to the averment in the second specification of complaint, the master finds as a fact that, before and at the date of this contract, there were "seven sizes, beginning with 'lump' coal, as the largest, and ending with 'chestnut' coal, as the smallest size. The names of each were lump, steamboat, broken, egg, stove (number three), stove (number four), and chestnut, respectively, and in that order of gradation as to size. Lump and steamboat coal—the latter being somewhat smaller than the former—were the larger pieces separated from the coal strata by the miner's blast. These came from the mine in the mine car, mixed with smaller pieces also resulting from the blasting operation. These smaller pieces which came from the mine in the mine car produced the other enumerated sizes, and, where a greater quantity of these were desired, some of the lump and steamboat sizes were broken for that purpose. In general, it may be said that the whole contents of the mine car, as mined and loaded into the car in the mines, and hoisted to the surface, was dumped into a chute leading to a series of iron bars located parallel with one another at the distance of five or six inches apart. The larger sizes of coal in the mine car, which did not drop through, but passed lengthwise over these bars, were lump and steamboat coal. That which dropped through or between the bars was screened and separated into the different sizes of broken, egg, stove of both sizes, and chestnut coal, already specified. But, in case this would not produce a sufficient quantity of the five sizes last

named, the desired amount was obtained by passing lump and steamboat sizes between revolving cylindrical rollers having projecting teeth with which to break or crack the coal, whereby these large pieces were broken into sizes like those which had passed between the bars, and these pieces, thus broken, were screened in the same manner into the five sizes specified. Coal which passed through small meshes constituting the first screen went to the dirt or culm bank, as it is called, and was not marketed, because there was no sale or demand for such small sizes. Coal that passed over the meshes of the first screen, and through those of a larger size in a succeeding screen, was chestnut coal, the smallest size marketed. Similarly, that which passed over the meshes of the screen last referred to, and through larger ones in a further screen, was stove coal number four; and in like manner, by the succeeding screens of larger, graduated meshes, the larger sizes of screened coal, up to and including so called broken coal, having a cubic diameter of about four inches, were produced. The term 'prepared coal,' as then commonly understood in this locality, in all coal transactions, embraced the five sizes of screened coal already mentioned, to wit, broken, egg, stove of both sizes, and chestnut, but no other kind of coal. Lump and steamboat, on the other hand, were coal not prepared. Under the system of rollers and appliances for breaking and preparing coal at that time, even when all the lump and steamboat sizes were passed through the rollers, the total production of chestnut did not exceed fifteen per cent. of the product of the mine, including in such product not only the chestnut and sizes above that, but also still smaller coal, equivalent to nine per cent. of the mine product which went to the dirt bank in sizes that later came into use as pea coal. Much of the mine output in this section was lump and steamboat, and was used in the surrounding country in operating large furnaces for smelting iron ore, or under boilers for the purpose of generating steam. Lump and steamboat coal and

the larger of the 'prepared' sizes were in far greater demand than the smaller sizes of prepared coal, and the market prices for the former were correspondingly higher. As a result, a large portion of the lump and steamboat coal was not then broken, and the production of chestnut, although not uniform, was much less than fifteen per cent., as above specified, and such of the latter as was marketed was much below that of any of the other kinds of coal in price. Whatever of chestnut could be sold at a profit was regarded as a saving of so much coal, incidentally resulting from the miner's blast, the handling of coal before it came out of the mines, and the roller process, which had for its purpose the production of the larger and more valuable sizes of prepared coal. The size of chestnut ranged, according to different collieries, from that which went over a screen with meshes one-half inch square, and through a screen with one-inch meshes (the smallest size and the least used), to that which passed over a screen of three-fourths inch meshes, and through one of one and one-fourth inches—the largest and most prevalent size made. In some cases the lease prescribed given meshes for chestnut, and, where this was not the case, the sizes differed within the range above indicated, according to different operators."

This clear and concise statement of the facts by the master, relating to the preparation of the coal at the date of the contract, is fully borne out by the evidence. He then finds that, soon after defendant's operations commenced, the demand for lump and steamboat coal rapidly fell off, and within a very few years practically ceased, while the demand for stove and chestnut coal greatly increased; that, about five years after the date of the contract, pea coal, a much smaller size than chestnut, and which before that time was thrown into the dump as worthless, acquired a market value, and defendant commenced and continued shipments and sales of it; that, later, buckwheat coal, a still smaller size, became marketable, and defendant shipped and sold large quantities of it. To

meet the changed demand, defendant ceased to produce for the market the larger sizes, such as lump and steamboat coal. To that end, it introduced additional rollers, which broke and rebroke the coal. It also introduced screens for the separation of the buckwheat coal; also, increased the size of the meshes through which the chestnut coal dropped, one-eighth of an inch. These and other changes in methods and machinery were adopted for the preparation of the coal to meet the new market demand. As a result, the master finds that some coal which under the old methods would have gone, in combination with bone and slate, to the dump, has been saved and paid for to plaintiffs, but that more than the equivalent of this saving, in consequence of the additional breaking to reduce it to smaller sizes, has been lost in dust and buckwheat coal, both being proportionately increased. And, although the master finds the motive for the method in preparation was only to create a salable product, he also concludes, to use his own language, that, while defendant "has not deliberately broken down coal for the primary purpose of avoiding the payment of royalties, yet the effect of this process has greatly diminished the value of the lessor's interest, when measured by the changed standard of production and payment of royalty. The lesser royalty prescribed by the lease for chestnut coal, and the fact that the defendant has never paid any royalty for pea or buckwheat sizes, have, in connection with the conditions of the market, contributed to the greater production of stove coal—the highest grade in the product, and, consequently, to a very large increase of chestnut and the smaller sizes; for the lesser market prices received for these smaller sizes have been more than counterbalanced in the greater one for stove coal, and in the lesser expenses on royalty account for the general coal product."

The master then, by a course of reasoning which amply vindicates his conclusions, thus interprets the contract:

"In our opinion, nothing smaller than chestnut was to be

paid for by the ton, and there was no intention of providing for payment on pea and buckwheat coal. This conclusion derives much strength, in our mind, from the fact that the lease, whether as regards the original or the extended term, expressly provides only half price, or seven and one-half cents per ton, for chestnut coal, the smallest size then known to the trade, and full price, or fifteen cents per ton, for all other kinds of coal to be paid for. A construction whereby pea and buckwheat coal, then unknown to the market by reason of their inferiority even to chestnut coal, should be paid for at double the royalty placed upon chestnut, and at a royalty equal to that fixed for all the larger sizes, would be unreasonable, and, in our judgment, clearly unwarranted."

As to coal consumed under the boilers, he says:

"Our further conclusion is that payment was contemplated for only such of these three products of coal mined as should be sold and marketed, and that the terms of the lease, viewed in the light of its subject-matters, do not contemplate any per ton royalty for coal that may be used under the defendant's boilers. While the terms of the lease in this latter respect are not as clear as they might well have been made, we are nevertheless convinced of the correctness of our conclusions from a consideration of its context, the well-known methods of hoisting and preparing the coal from the mines by means of the use of extensive steam power obtained by the incidental consumption of the coal itself, and the general purposes of the lease."

And this last conclusion, the master shows, from the terms of the lease and invariable custom, to be a correct one.

But then arises another question, viz.: Even if, by the terms of the lease, at the date of it, it was not in contemplation of the parties that any less size than chestnut should be paid for, nevertheless is not the defendant, under a reasonable interpretation of the contract, answerable for additional royalty on account of the largely increased production of chestnut

coal, altogether beyond the intention of the parties at the date of their contract, and because of the excessive production of pea coal, caused by the increased quantity of chestnut? The contract is silent as to what proportion of the whole product shall be chestnut, and be paid for at half price. The plaintiffs argue that the contemporaneous facts and customs of the mining business at the date of the contract must be assumed as having been within the contemplation of the parties, and that on such knowledge they contracted; that, when half price was fixed for chestnut coal, they meant half price for such quantity as resulted from mining and preparation in that mining territory at that date. The defendant, in reply, argues that the lease provides for breaking the coal, and that its very silence as to the extent it shall be broken, or the proportion of the sizes, leaves defendant free to adopt such methods for the future as will adapt the coal to the market demand, without thereby increasing its liability for royalty. The master comes to this conclusion:

"In our opinion, the terms of the lease fairly contemplate the breaking of the whole mine product into the different sizes of what was 'prepared coal' in 1864, with their proportionate percentages to one another, by means of the methods and appliances in general use at that time, and the manner then employed of operating such appliances, if the demands of the defendant's market for selling coal reasonably require the breaking and preparation of the product to that extent, and the operation be performed 'with as much economy and as little waste as may be'; and payment of royalty measured by this standard is all that the contract calls for. To this extent we concur with the position of counsel for the defendant; but we find nothing in the terms of the lease which contemplates the breaking of this mine product to a greater extent than that already indicated, and while new conditions of the market for the sale of the defendant's coal, in competition with other operators, have justified it in adopting methods and ma-

chinery by which not only all the mine product has been broken to prepared sizes, but to the smaller of these sizes, whereby a great proportionate increase of chestnut and pea coal has occurred, these were not contemplated by the contract and therefore the plaintiffs are entitled to payments of royalty upon the standard above indicated."

While it is difficult to demonstrate that such was clearly the intent of the parties, it is very easy to show that the argument of defendant leads to an unreasonable conclusion, and one that works palpable injustice to the landlord; for, if payment under the contract be measured by the preparation of the coal to any size which defendant thinks may suit the market, then, if the market demand is mainly for pea and buckwheat, and nearly all of it be crushed to those sizes, plaintiffs are entitled to almost no royalty. The size of coal the market demands, and will alone accept, will doubtless determine the size which defendant will prepare and ship; but it cannot deprive the lessor of his right of contract payment; that must be determined by what the parties assented to at the date of the contract, and by their contract, and not by something unforeseen by either. It is sufficient to say that with a somewhat obscure agreement, and evidence vague, at best, to guide him, the master adopts that view which is most consonant with reason, and in no way conflicts with any of the terms of the written contract. In so doing he follows the suggestions in *Navigation Co.* v. *Moore,* 2 Whart. 477; *Dunham* v. *Haggerty,* 110 Pa. St. 560, 1 Atl. 667; and *Lance* v. *Coal Co.,* 163 Pa. St. 91, 29 Atl. 755. We affirm his conclusion.

The master then finds that, at the date of the contract, the proportion of chestnut coal did not exceed 15 per cent. of the product of the mine, and that pea coal, which then went into the dump, equalled 9 per cent. of the product; that from February 1, 1873, the date of settlement between lessor and lessee, to August 21, 1893, there was prepared as chestnut coal, in excess of this 15 per cent., 188,469 tons; and that for every

additional ton in excess of this percentage, there has been an excess of pea coal amounting to four-tenths of a ton, or 75,378 tons. On this the master computes royalty,—15 cents for excessive production of chestnut; for one-half the excessive production of pea coal, which, but for the new method of preparation, would have been large-sized coal, 15 cents; and on the other half, which would have been chestnut, 7½ cents. This last computation afterwards, on exceptions, the master, sitting as judge, found to be error, and that the whole of the excess of pea coal, on the evidence, should be treated as what otherwise would have been larger size than chestnut, and therefore rated at 15 cents per ton. As thus computed, the balance with interest due from defendant to plaintiffs, was determined to be, on August 21, 1893, $42,116.77.

Of the twenty-two assignments of error preferred by appellant, all except the thirteenth are to findings of fact and conclusions of law touching the master's interpretation of the contract. While we have considered them all, we are unable to sustain any one of them, except the thirteenth, and this we sustain only in part. In this assignment, it is claimed that the knowledge of the lessor's ancestor, of the percentage of production of chestnut coal, and his receipt of the royalty prices, fixed the interpretation of the agreement, not only for himself, but for his descendants, who now represent him in the contract. There is nothing in the evidence, in this particular, tending to show that at that early date there was any question as to the interpretation of the contract by either party. The coal business was at the date of the accounts from the settlement, in 1873, to 1881, in a very depressed condition. The returns during that period showed a production of chestnut coal running from 20 to 30 per cent., or 5 to 15 per cent. above the average at the date of the contract. The lessor, on June 3, 1878, had received a return of coal mined, from Davis, sublessee of defendant. It showed lump and prepared coal, 4,871½ tons; chestnut, 2,489

tons. Of this, the lessor, although the letter is not produced, evidently complained; for plaintiffs offer in evidence the reply of Davis, June 6, 1878, which to some extent discloses the grounds of the complaint. It says: "The coal mined at Warrior Run cannot be sold for iron purposes, nor for steam, and consequently has to be broken down into domestic sizes, and hard to sell at that. The return, instead of being as you say, in chestnut, more than half the product of the mine, is as follows: 7,360 tons, total amount mined, 2,489 tons chestnut, or about 30 per cent., which is the amount we are obliged to make in these times, and which is no greater than Lehigh Valley Coal Co., Swoyer, and others are making outside of lump coal shipments. Now, Colonel, I appreciate your former generosity, and know your liberality," etc. This assumes that complaint had been made by Col. Wright, the lessor, that an undue quantity of chestnut coal was being produced. The lessee seeks to excuse it, because of an exigency. The lessor accepts payment, however, notwithstanding the excess of chestnut, at half the price of lump, and receipts in full; and so he continues to accept payment, and receipt in full down to March 7, 1881. He died September 2, 1881. Clearly, he had full knowledge of the excessive production, and protested against it, but, being appealed to by Davis, waived his right, and receipted in full; and so with each return up until his death. This was not an interpretation of the contract favorable to defendant. Rather, it was directly the reverse. But, with full knowledge of his right, every receipt of money in full, on an account, embracing the excess, was a waiver of his right to insist on a strict interpretation of the contract in his favor. The payments may not have been in full of what was his due, but he chose to accept them, and his representatives cannot now go behind them. It was an act of generosity on the part of the lessor, which he had the right to exercise. This is not the case of a false return accepted by the lessor as in *Dunham* v. *Haggerty,* 110 Pa. St. 560, 1 Atl. 667; it is a

correct statement of the fact, with an appeal to generosity for a reduction in price. And it does not follow that either his knowledge or generosity must be imputed to his representatives, so far as concerns payments made to them. There is no proof of knowledge on their part that the production of chestnut coal was in excess of that within the meaning of the contract, nor any evidence of an exigency appealing to their generosity to prompt a waiver of their right.

We are of opinion, therefore, that computation of the excess, on the interpretation of the contract as adopted by the learned master and judge of the court below, should be made only on returns dated from the last receipt of Hendrick B. Wright, next to and immediately preceding his death. In all other particulars the master's very able and clear report is approved, and his decree, as herein modified, is affirmed. It is ordered that the record be remitted to the court below, that computation be made as herein directed; costs of this appeal to be paid in equal parts by appellant and appellees.

MITCHELL, J. (dissenting). I would reverse this judgment, as making a new contract for the parties, in the light of subsequent events, in place of the one they made for themselves. I do not find any basis in the lease for the master's assumption that it contemplates "the breaking of the whole mine product into the different sizes of what was prepared coal in 1864, with their proportionate percentages to one another, by means of the methods and appliances in general use at that time." It is in the highest degree unjust and illogical to suppose that in an agreement made to extend certainly over 10 years, and at the lessee's option for 99 more, the latter cut themselves off from improved methods of mining, and bound themselves to the methods, appliances, and proportions of product commonly used at that date. On the contrary, the lease, in my view, gave the appellant the clear right to produce the different sizes of prepared coal without restriction as to the proportion of each to the whole. They

were to pay the same royalty on all the sizes from the "lump" to "stove No. 4," but could produce as much or as little of each as, in their judgment, would be most profitable, and therefore could reduce it all to "stove No. 4," the smallest prepared size on which the full royalty was payable. This is all that, in fact, they have done. The market calling for a larger proportion of the small sizes, they have passed the coal through the rollers twice. Incidentally, in so doing, they have made more of the chestnut size than before; but the production of chestnut was always incidental, both at the time of the contract and now. If the demand for chestnut had ceased altogether, so that it became unsalable, appellant would nevertheless have had to pay for it, for they had taken that risk in their bargain, and it would have been their loss. In fact, the demand increased, and that is their legitimate profit. Of course, if larger sizes, requiring full royalty, were intentionally reduced to chestnut, they would still have to pay full royalty, for the contract does not contemplate the production of chestnut except as a necessary incident to the production of the stipulated "prepared" sizes. But no such evasion of royalty appears in the case. On the contrary, the master finds explicitly that the additional quantity of chestnut is necessarily produced by the reduction of lump and steamboat to the smaller sizes, and that the process of double rolling is the least wasteful plan of reaching the desired result.

I do not understand the appellant's argument to claim, as the opinion of the court states it, that they could prepare the coal "to any size which the defendant thinks may suit the market," but only to any of the stipulated sizes paying full royalty. The former claim, if made, is clearly too broad; but, with the limitation to sizes paying full royalties, the claim not only avoids entirely the *reductio ad absurdum* of the court, but is the just and fair interpretation of the contract, and shows that the appellant was at all times within its legal rights, and has accounted fully for all of complainants' just demands.

CARSON CITY GOLD AND SILVER MINING CO. v. NORTH STAR MINING CO.

(83 Federal 658. Circuit Court of Appeals, Ninth Circuit. October 18, 1897.)

Apex rights on group claims. A patent issued upon a group of locations as one lode mining claim, carries the right to follow on the dip all veins which apex within its side lines the same as where a patent issues upon a single location.

The burden of proving the existence of the apex within his lines is upon the party asserting extra lateral rights.

[1]**Presumption in favor of patent.** A patent delivered has the conclusive presumptions in its favor of ownership in the grantee, a proper location, a discovery and the required legal expenditures.

[2]**Group patent construed as on single location.** A patent based upon a number of consolidated locations is to be construed as a patent upon one location. The rule held in the *Kemp Case* that several purchased placer locations become one claim applies to lode claims. The law limiting length to 1,500 feet does not apply to such case.

Excessive width. A patent upon a group of lode claims treated as one claim with a width of from 650 feet to 1,250 feet is valid to the full width: the *Lakin Cases* to the contrary held to be distinguishable.

[3]**Where the end lines converge** the right to follow the lode on the dip exists within the planes on which such converging lines would unite.

In error to the Circuit Court of the United States for the Northern District of California.

This is an action of trespass brought by the plaintiff in eror, as owner of the Irish-American mining claim, situated in Nevada county, Cal., against the defendant in error, which, as the owner of the North Star claim, has followed and worked its lode upon its descent under the surface of the Irish-American claim. Both claims are patented, and each claim, as patented, is a consolidation of a

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[1]But this presumption is not conclusive against a party who has never had opportunity to have his day in court to attack it. *Uinta Co.* v. *Creede Co.* 119 Fed. 164.

[2]Compare *Del Monte Co.* v. *New York Co.* 18 M. R. 188.

[3]*Argonaut Co.* v. *Kennedy Co.* 131 Cal. 15; 63 Pac. 148.

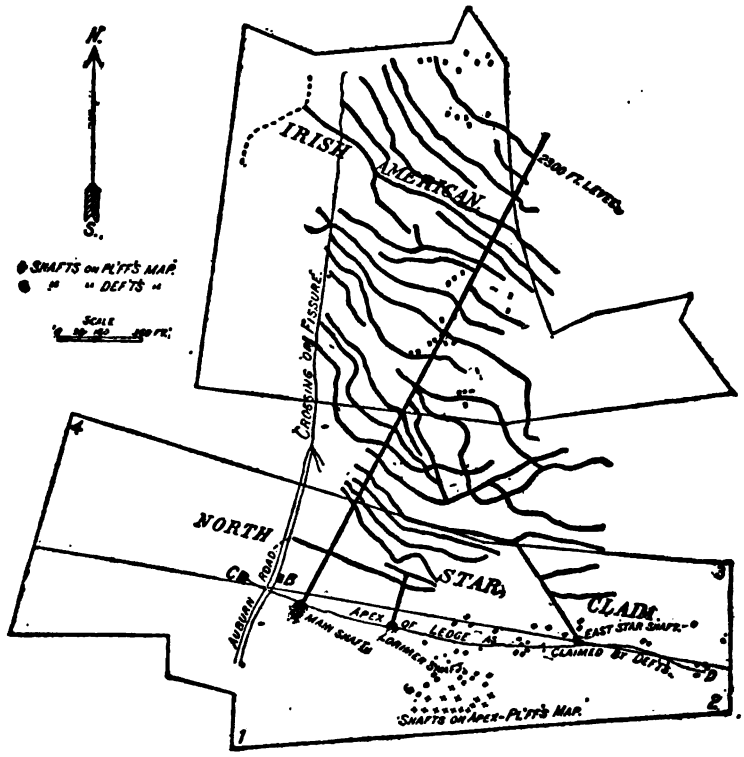
number of small claims, many, if not all, of which were located long prior to the enactment of any mining law by congress, and was patented in the irregular shape, and of the unusual size, represented upon the diagram hereinafter inserted. The questions presented by the writ of error are based upon the alleged insufficiency of the findings of the circuit court to support the judgment rendered in favor of the defendant in error. The cause was tried before the court without a jury. The court found, among other things, that: (3) On or about December 7, 1877, the government of the United States, in pursuance of the provisions of chapter 6, tit. 32, of the Revised Statutes of the United States, issued and delivered its patent to one Michael McDonough, conveying the mining ground and claim situate in Grass Valley mining district, county of Nevada, and state of California, known as and called the "Irish-American Mine," described as follows: Lot 68 in township 16 N., range 8 E., and lot 53 in township 15 N., range 8 E., Mount Diablo meridian,—in the official plats of the mineral surveys of the government of the United States. That said patent was issued subject to the following conditions and stipulations, to wit: "First, that the grant hereby made is restricted to the land hereinbefore described as lots Nos. 53 and 68, with twenty-three hundred and seventy-six and sixty-six hundredths linear feet of the Irish-American quartz mine, vein, lode, ledge, or deposit, for the length aforesaid, throughout its entire depth as aforesaid, together with all other veins, lodes, ledges, or deposits, throughout their entire depths as aforesaid, the top or apex of which lies inside the exterior lines of said survey; second, that the premises hereby conveyed, with the exception of the surface, may be entered by the proprietor of any other vein, lode, ledge, or deposit, the top or apex of which lies outside the exterior limits of said survey, should the same, in its downward course, be found to penetrate, intersect, extend into, or underlie the premises hereby granted, for the purpose of extracting such other vein, lode, ledge, or deposit." (4) That on the 26th day of June, 1894, the plaintiff in this action became the owner of said Irish-American mine, as described in finding 3, by mesne conveyances from said patentee, and ever since said last-named date has been, and now is, the owner, in possession, and entitled to the possession, of, all and singular, said property. (6) That at all times mentioned in plaintiff's complaint, and for more than 30 years prior to the commencement of this action, the defendant, North Star Mining Company, its predecessors and grantors, were the owners in possession, and entitled to the possession, of all that certain mine and mining claim situate in Grass Valley mining district, Nevada county, state of California, known as and called the "North Star Mine," a particular description of the metes and bounds of said claim being contained in said finding, containing "sixty-five (65) acres and fif-

teen-hundredths (15-100) of an acre of land, more or less." (8) That said North Star mine of defendant is situated in a southerly direction from the Irish-American mine of Plaintiff, the north boundary of said North Star mine being an average distance southerly from the south boundary line of said Irish-American mine 430 feet. The end lines of said North Star mine are as follows: The course called for in the description contained in finding 6, between stakes N. S. No. 1 and N. S. No. 2, N., 15° E., 14.97 chains, is the west end line of said North Star mine; and the course connecting stake N. S. No. 4 with N. S. No. 5., S. 30′ W., 10 chains and 30 links, is the east end line of said claim. Said end lines are not parallel, but converge in the direction of the dip of the North Star ledge, hereinafter mentioned. That within the surface boundaries of said North Star mine, as hereinbefore described, there is a ledge of rock in place, known as and called the "North Star Ledge;" and, to the extent hereinafter specified, said ledge has its top or apex wholly within said surface boundaries. That the general course or strike of said ledge is N., 81° 15′ W., or S., 81° 15′ E., and the top or apex thereof traverses approximately the center of said (patented surface area of said North Star) mine. On its eastward course it crosses said east end line at a point thereon distant 200 feet northerly from the stake marked "N. S. No. 5," referred to in the description contained in finding 6. On its westward course, said top or apex of said ledge, so far as hitherto developed and established, continues to a point 2,200 feet from the east end line, measured on the course or strike N., 81° 15′ W., which said point, for the purpose of identification and reference, is hereby designated as the western terminus of said top or apex of said ledge. (9) "That the title of said defendant to said North Star mine and said North Star ledge is as follows: On September 15, 1869, and for many years prior thereto, the North Star Gold-Mining Company, the immediate predecessor in title of said defendant, was, as against every one save and except the government of the United States, the owner of said North Star ledge, with the right to follow the same to any depth on its downward course into the earth. That on said September 15, 1869, and under and by virtue of the provisions of an act of congress entitled 'An act granting the right of way to ditch and canal owners over the public lands and for other purposes,' of July 26, 1866, said North Star Gold-Mining Company made application to the government of the United States to enter and receive a patent for said ledge, together with so much of the surface ground adjoining the same as was reasonably necessary for the purpose of working said ledge, and as was authorized by the local rules and regulations of miners which were then in force in the locality where said ledge was situated. That thereafter, in pursuance of said application so made, and on August 11, 1875, the gov-

ernment of the United States issued its patent to said North Star Gold-Mining Company, conveying, all and singular, said North Star mine, as described in finding 6, together with said North Star ledge, throughout its entire depth, together with all other veins, lodes, ledges, and deposits, throughout their entire depth, the tops or apices of which lie inside of the exterior lines of said mine as hereinbefore described. (That said North Star claim was originally composed of a number of smaller claims, which were consolidated into one patent, as the North Star claim, and that the lines, exact locality, or area of such original claims were not shown upon the trial, except so far as the patented lines of the North Star patent establish, or tend to establish, such facts.) That thereafter, and on or about June 16, 1884, said North Star Gold-Mining Company sold and conveyed all of said property to the defendant herein, which thenceforward has continued to be, and now is, the owner thereof." (10) That said North Star ledge descends into the earth in a northerly direction, and at an angle of about 25° from the horizon, and, in its downward course, passes outside the planes drawn vertically through the north side line of said North Star mine, and enters the land adjoining, and reaches, penetrates, extends into, and underlies the said Irish-American mine, the property of the plaintiff herein. (11) That upon said ledge, at a place therein within the boundaries of said North Star mine, defendant and its grantors and predecessors in title have sunk an inclined shaft, and extended the same to the present depth of 2,600 feet or thereabouts, and by means of said shafts and drifts, levels and stopes extended therefrom, in said ledge have for more than 30 years last past been engaged in extracting and removing from said ledge ore and mineral-bearing rock therefrom. That for more than twenty-five years next preceding the commencement of this action, with the full knowledge of the owners of said Irish-American mine described in said plaintiff's complaint, the defendant and its grantors have been in possession of and working said North Star ledge, and extracting and removing ore and mineral-bearing rock therefrom, underneath the surface of said Irish-American mine, by means of said inclined shafts, drifts, levels, and stopes. That all of said work and extraction and removal of ore and material by said defendant and its grantors have been upon said ledge (which has its apex wholly within the lands and premises of defendant) hereinbefore described, and all of the mineral deposits heretofore or now appropriated by any of said underground works of said defendant are parts of said ledge. That the defendant never at any time entered upon the lands or premises described in plaintiff's complaint as the "Irish-American mine," or any portion thereof, except upon and in the lawful pursuit of and following its said North Star ledge on its downward course as it penetrates into said premises described

in said complaint, underneath the surface thereof, as hereinbefore set forth. That substantially all of the excavations, openings, drifts, and other works made by the defendant underneath the surface of said Irish-American mine, lie between vertical planes drawn through the east end line of said North Star mine, as hereinbefore described and said line produced indefinitely in its own direction, and another similar plane, parallel to said east end line, crossing said North Star mine at the point fixed in finding 8 as the western terminus of the top or apex of said ledge; said point being at a distance of 2,200 feet N., 81° 15′ W., along the general course of the vein, measured from the point on said east end line where said ledge crosses the same as set forth in said finding 8. (13) The court finds that there is a fissure, or at least a distinct line or change in the geological formation of the country, called in this case a "crossing," which runs nearly north and south through the mine; that its underground course is approximately indicated by the westerly ends of the several levels and workings; that its location upon the surface is not clearly located; that while the workings on the 1,800-foot level extend west of it, very little, if any, ore has been found there, and the workings of the mine, with some unimportant exceptions, sustain plaintiff's contention that this crossing marks the western limit of the ledge. (14) The court finds that the course and relative position of the various levels and workings of the mine, so far as shown by the testimony are approximately represented in the copy of defendant's exhibit 8, which is hereto attached as a part of this finding, and is as follows: (page 123).

Upon the foregoing facts the court found, as conclusions of law: (1) "That the defendant had a right to pursue and follow its North Star ledge on its downward course to any depth underneath the surface of said Irish-American mine within vertical planes drawn through its east end line of said North Star mine and said line produced indefinitely in its own direction, and a similar parallel plane crossing said North Star mine at a point designated in these findings as the 'western terminus' of the top or apex of said ledge, which point is distant 2,200 feet north, 81° 15′ W., measured from the point on said east end line where said North Star ledge crosses the same on its onward course: provided, however, that in no event shall the defendant be permitted to pursue its ledge west of a perpendicular plane extended through the west end line of said North Star mine and said line produced indefinitely in its own direction." (2) "That the entry by defendant underneath the surface of said Irish-American mine was lawful, and in virtue of the right and ownership of said defendant in said North Star mine and said North Star ledge; that no trespass has been committed upon the property rights of plaintiff; and that said plaintiff has suffered no damage by reason of any of the acts or things done or suffered by said defendant." (3) "That the defendant is entitled to a judgment for its costs."



DICKSON, ELLIS & ELLIS, for plaintiff in error.

CURTIS H. LINDLEY and HENRY EICKHOFF, for defendant in error.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

HAWLEY, District Judge (after stating the facts). Do the findings of facts sustain the conclusions of law arrived at by the court? Is the defendant entitled, under the facts as found by the court, to any extralateral rights? Was it necessary for

the defendant to prove the lines of its various locations comprising the area covered by the patent, or was it sufficient for it to show the existence of a vein or lode, with the dip and strike of that vein or lode within the surface boundaries of the North Star claim as patented? It is argued by plaintiff that section 2322, Rev. St. U. S., refers exclusively to the extralateral rights pertaining to a single location; that the idea of extralateral rights arising out of a number of consolidated locations was not within the contemplation of congress when said statute was adopted. This statute reads as follows:

"The locators of all mining locations heretofore made or which shall hereafter be made, on any mineral vein, lode, or ledge, situated on the public domain, their heirs and assigns, where no adverse claim exists on the tenth day of May, eighteen hundred and seventy-two, so long as they comply with the laws of the United States, and with state, territorial, and local regulations not in conflict with the laws of the United States governing their possessory title, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side-lines of such surface locations. But their right of possession to such outside parts of such veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward as above described, through the end lines of their locations, so continued in their own direction that such planes will intersect such exterior parts of such veins or ledges. And nothing in this section shall authorize the locator or possessor of a vein or lode which extends in its downward course beyond the vertical lines of his claim to enter upon the surface of a claim owned or possessed by another."

It is not denied that the defendant might purchase all the various locations comprising its patented area of 65 acres, covering one or more lodes or veins, and that, being the owner thereof, it might obtain from the United States a patent covering all the ground embraced in the original locations. But plaintiff contends:

"That no applicant for a patent, by pursuing this method, leaving out all boundary lines, end lines and side lines of the various locations composing the consolidated claim, by obliterating on paper all traces of boundaries of the locations, and thereby all evidence of extralateral rights, can thereby secure extraordinary rights which he did not possess before. * * * It is the location, and the manner of it, through which the extralateral right is derived. That location may ripen into a patent, and its lines be finally fixed and determined in and by the patent; and if correctly laid upon the surface, and evidenced by the patent, and a vein passes through the end lines of it, or, say, one end line, he may have, as to that vein, extralateral rights. * * * If the boundaries of the several locations comprising the aggregate amount applied for and patented do not appear in the patent, but only the exterior boundaries of the entire aggregated tract, then surely the patentee, if he claim the extralateral right as to any vein the apex of which is found within the surface of his aggregate tract, should be held to establish by proof where some location was, and how it was laid upon the ground, or be denied the extralateral right."

Can this contention be sustained? The precise point here involved has never been discussed in any of the decided cases to which our attention has been called. We are of opinion that the defendant was not required to show the separate lines of any of the original locations embraced within the surface boundaries of its patented claim. It was enough for it to show that a lode running in an easterly and westerly direction, and having its apex within the surface boundaries of the patented ground of the North Star, extended, in its dip downward, into the workings of the Irish-American ground owned by the plaintiff in error, and that all its acts complained of by the plaintiff were in extracting ore from such lode "extended downward vertically," within its side-line planes, beneath the patented lines of the Irish-American ground. It is true that the burden was upon the defendant to show by a preponderance of evidence that the ore which it extracted from beneath the patented surface ground of the plaintiff belonged to the lode or vein, the apex of which was within the surface lines of its own patented ground. *Duggan* v. *Davey,* 4 Dak. 110, 122, 26 N. W. 887, 891; *Leadville Co.* v. *Fitzgerald,* Fed. Cas.

No. 8,158; *Doe* v. *Mining Co.*, 54 Fed. 935, 937; *Con. Wyoming Co.* v. *Champion Co.*, 63 Fed. 540, 551. But this burden is met and overcome by the undisputed facts, found by the court, that the defendant was the owner of and in possession of the entire apex of the lode within the boundaries of the North Star patented mine, and its continuity and identity in its dip downward vertically beneath the Irish-American ground. It was unnecessary to go further, by proving the lines of one or more or all of the locations as originally made. When the patent was issued the owner thereof became entitled, not only to such lodes as had been previously located, but to all other "veins, lodes and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes or ledeges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations." If, therefore, any lode, as located, or any other lode thereafter found within the surface location, runs in an easterly and westerly direction between the end lines lengthwise, and on its downward dip extended into the earth beneath the Irish-American claim, this would be sufficient to authorize the judgment in favor of the defendant. The extralateral right conferred by the statute is but an incident of a valid lode location.

There are certain presumptions in favor of patents regularly issued by the government for mining ground, which have more or less application to the question at issue here. These presumptions must not be overlooked. When the patent to the North Star mine was issued, it was conclusive that the parties named therein as grantees were the owners, not only of the surface ground, but of 3,140 linear feet in length of any lode, if so much thereof should be found within said surface boundaries, and of all rights and privileges incident thereto; that the several locations included therein had been properly made in accordance with the law, including a

discovery of the lode; and that the amount of work required by law had been performed thereon. Then comes the statute which secures to the patentee, not only the surface ground, with a lode and vein having its apex therein, but gives to him the extralateral right to follow such lode or vein downward into the earth as therein expressed. Such is the natural deduction to be drawn from the principles announced in the following, as well as other, cases: *Smelting Co.* v. *Kemp,* 104 U. S. 636, 646; *Steel* v. *Refining Co.,* 106 U. S. 447, 1 Sup. Ct. 389; *Tucker* v. *Masser,* 113 U. S. 203, 5 Sup. Ct. 420; *Davis* v. *Weibbold,* 139 U. S. 507, 11 Sup. Ct. 628; *Kahn* v. *Mining Co.,* 2 Utah, 175, 198; *Talbott* v. *King,* 6 Mont. 76, 104, 9 Pac. 434; *Chambers* v. *Jones,* 17 Mont. 156, 162, 42 Pac. 758; *Mining Co.* v. *Campbell,* 17 Colo. 267, 272, 29 Pac. 513; *Mining Co.* v. *Lee,* 21 Colo. 260, 40 Pac. 444; *Doe* v. *Mining Co.,* 54 Fed. 935, 940; *Book* v. *Mining Co.,* 58 Fed. 106, 128; *Eureka Co.* v. *Richmond Co.,* 4 Saw. 302, 319, Fed. Cas. No. 4,548.

In *Talbott* v. *King* the court said:

"The issuance of the patent conclusively proves all these precedent acts and facts which the land department must find to exist before the patent can rightfully issue. The act of the department, therefore, in issuing a patent, is an adjudication, and, like a judgment, is final as to all matters necessarily included in and determined by it. What, then, does a patent to a mining claim prove? (1) That the lands bounded and described therein are mineral lands; (2) that a discovery and location within said boundaries has been made according to law; and (3) that the necessary amount of work has been performed thereon, and that all preliminary and precedent acts necessary in order to authorize and justify the issuance of the patent have been performed as the law requires. The issuance of a mining-claim patent proves that there was a discovery and location according to law."

In *Smelting Co.* v. *Kemp* the court said:

"A patent, in a court of law, is conclusive as to all matters properly determinable by the land department, when its action is within

the scope of its authority; that is, when it has jurisdiction, under the law, to convey the land. In that court the patent is unassailable for mere errors of judgment. Indeed, the doctrine as to the regularity and validity of its acts, where it has jurisdiction, goes so far, that if in any circumstances, under existing law, a patent would be held valid, it will be presumed that such circumstances existed."

In that case the defendant contended that a patent could not be issued for a placer mining claim which embraced over 160 acres, and the court held that the patent might include as many adjoining locations as the patentee had purchased, and that the proceedings to obtain a patent therefor were the same as when the application covered but one location. Among other things, the court said:

"There is nothing in the reason of the thing, or in the language of the acts, which prevents an individual from acquiring by purchase the ground located by others, and adding it to his own. * * * His claim may include as many adjoining locations as he can purchase, and the ground covered by all will constitute what he claims for mining purposes, or, in other words, will constitute his mining claim, and be so designated. Such is the general understanding of miners, and the meaning they attach to the term. * * * If one individual should acquire all such contiguous claims by purchase, no sound reason can be suggested why he should not be equally entitled to enter them all by one entry, as when they were held by the original parties. * * * It was therefore very natural, when patents were allowed, that the practice of presenting a single application with one survey of the whole tract should prevail. It was at the outset, and has ever since been, approved by the department and its propriety has never before been questioned."

This language is certainly as applicable to the location of lode claims as to placer claims.

In *Mining Co.* v. *Campbell, supra,* the court declared that there could be no higher evidence of title than a patent from the United States, and that, in favor of the validity and integrity of such an instrument, it must be presumed that all antecedent steps necessary to its issuance were duly taken. As was said by Mr. Justice Field in the *Eureka Case:*

"A patent of the United States for land, whether agricultural or mineral, is something upon which its holder can rely for peace and security in his possessions. In its potency, it is ironclad against all mere speculative inferences."

And in *Chambers* v. *Jones, supra,* the court held that, after the issuance of a patent to a mining claim, the sufficiency of the location notice cannot be questioned.

These general principles are amply sufficient to sustain the ruling and decision of the lower court. Any other conclusion might result in making invalid many patents heretofore issued upon consolidated locations. Especially would this be true if plaintiff's contention should be sustained, that every presumption must be construed against the patent. A patent from the government would be of but little, if any, use or effect, if the duty devolved upon the patentee, whenever the validity of his claim is called in question, to prove that each separate location was properly made in strict conformity with the law. One purpose, object and effect of procuring a patent is to at once and forever settle this question, and set at rest all further contests in relation to such matters. As was said by the court in *Doe* v. *Mining Co.,* 54 Fed. 935, 940:

"If questions relating to the boundaries of the location, the marking of them, the discovery of a vein, lode, or ledge within them, the posting of the required notice, etc., are open to contestation after the issuance of a patent for the claim, as before, the issuance of such an instrument would be a vain act, and would wholly fail to secure to the patentee the rights and privileges designed by the law authorizing its issue. The very purpose of the patent is to do away with the necessity of going back to the facts upon which it is based."

Of course, patents may be set aside on the ground of fraud, or in cases where it appears upon the face of the patent that it was issued in a case not authorized by law. But in this case the plaintiff expressly denies making any attack upon the patent, and admits its validity, binding force, and conclusive-

ness, as to all the ground within the surface boundaries of the patented lines. If good for the veins and lodes found within the surface boundaries, does not the statute, in direct terms, give the right to follow such veins and lodes in their downward course? If there was but one location upon which a patent was obtained for a piece of surface ground 1,500 feet in length and 600 feet wide, 300 feet on each side of the lode, would it be necessary for the owner of the ground, after introducing his patent, to prove up his original location, the lines and bounds thereof, in order to entitle him to receive all the rights and privileges given him by the statute? Certainly not. His patent, with the additional fact of proving the existence of a lode, with its course and dip, would be all that the law requires. Now, if the patent is for a lode 3,000 feet in length, would it be necessary to show that there were two locations, and the lines and bounds of each? Should this right be denied on the ground that it is possible to draw imaginary lines, so as to show that, if the locations were made in the way imagined, the lode would cross the end or side lines in such a way as to prevent the defendant from having any extralateral rights beneath the plaintiff's surface ground? Are courts compelled to give heed to such arguments, and indulge in such wide fields of speculation? If any presumptions are to be indulged in, should not the court presume that the several locations were made in such a manner as to include the lode lengthwise, as it is actually proven to be, within the surface lines of the patented location?

So far, in the discussion of the question herein involved, it has been assumed that the several mining locations were made in the manner and form prescribed by the acts of congress of 1872, by taking up a piece of ground described by metes and bounds, in the form of a parallelogram. But the locations were not made under the provisions of the act of 1872. It is alleged in the answer:

"That continuously for more than forty years last past this defendant, and its grantors and predecessors in title, have been, and defendant now is, the owner, in the possession of, and entitled to the possession of, 3,140 linear feet of that certain lode or ledge of rock, in place, carrying gold and silver, situate, lying, and being in the township of Grass Valley, Nevada county, state of California, formerly known as and called the 'French Lead,' and now known as and called the 'North Star Ledge.'"

The locations must therefore have been made prior to any acts of congress, and were governed solely by the rules and regulations adopted by the miners of the district where the lode in question was situated. They were not required to be made in the form of a parallelogram, taking up any specific quantity of surface ground. The lode was the principal thing which the miners sought, discovered, and located, with all its dips, spurs, and angles. The location was made for a given number of feet of the lode, and the locators were entitled, under the local rules, laws, and customs of miners, to the number of feet claimed on the lode, in whatever direction or course it was found. There was no question raised as to any side lines, for there were none. The locators were allowed a number of feet of surface ground on each side of the lode, sufficient for the convenient working of the same. As was said by the court in *Golden Fleece Co.* v. *Cable Co.*, 12 Nev. 312, 328:

"The claim was defined by the terms of the notice, and not by posts and monuments erected on the surface of the earth. The notice claimed so many feet of the vein, with the adjacent surface. If subsequent developments demonstrated that the course or strike of the vein differed from that mentioned in the notice, the locator was still allowed to follow the vein to the extent claimed, because there was no difficulty in reconciling the description in the notice with the deflection in the vein from its apparent course at the discovery point, and because the claim in fact was of so much of the vein, wherever it might run. As the surface ground allowed by the miner's rules was a mere incident to the vein, and was to be adjacent to it, and was never marked by posts or monuments, any more than the vein

itself, it followed, as a matter of course, that when the true course of the vein was discovered the surface ground was located in conformity to it."

See also, *Walrath* v. *Mining Co.*, 63 Fed. 552, 556.

These regulations and customs of the miners were sanctioned and approved by the legislatures of the states, sustained and enforced by the courts, until 1866, when congress took the first step authorizing the sale of the public mineral lands, by enacting a law declaring that such lands were free and open to exploration and occupation by citizens, and others who had declared their intention to become such, subject only to such regulations as were or might be prescribed by law, and the local rules, regulations, and customs of miners, not in conflict with the constitution or laws of the United States. Nothing is contained in the act of congress which in any manner interferes with the validity of the previously acquired rights of the miners under the local rules, customs, etc. On the contrary, it was expressly provided:

"That whenever any person or association of persons claim a vein or lode of quartz, or other rock in place, bearing gold, silver, cinnabar, or copper, having previously occupied and improved the same according to the local customs or rules of miners in the district where the same is situated, and having expended in actual labor and improvements thereon an amount of not less than one thousand dollars, and in regard to whose possession there is no controversy or opposing claim, it shall and may be lawful for said claimant or association of claimants to file in the local land office a diagram of the same, so extended laterally or otherwise as to conform to the local laws, customs, and rules of miners, and to enter such tract and receive a patent therefor, granting such mine, together with the right to follow such vein or lode with its dips, angles and variations, to any depth although it may enter the land adjoining, which land adjoining shall be sold subject to this condition." 14 Stat. 251.

It was in this condition of the law that the grantors of the defendant, in September, 1869, applied for a patent for 3,140 linear feet of said North Star ledge, which application re-

mained unacted upon until after the passage of the act of May 10, 1872, and until August 11, 1875, when the government of the United States issued its patent granting to the North Star Gold Mining Company the land set forth in the diagram, to wit, 3,140 linear feet of said North Star quartz ledge, throughout its entire depth, together with all other veins and lodes, ledges and deposits, throughout their entire depth, the tops or apices of which lie inside the exterior lines of the patented ground. Upon these facts, it cannot, in the light of reason, or upon the authority of any decided case, consistently be said that the defendant having title to the North Star lode under this patent is not entitled to any extralateral rights, because it did not prove the boundaries of one or more of the original locations of the ground included in the diagram. In the light of all the findings, we have the right to presume, in the absence of any proof to the contrary, that the original locations were made along the lode lengthwise, and that when the patent was applied for, a survey of the surface ground was made, and the surface boundaries were marked upon the claim, which consisted of several locations; the lode claim, as thus patented, was thereby limited in extent to the survey of the surface ground, and the owner of the claim, as thus patented, had no right, under the act of 1866 or of 1872, to follow the lode lengthwise beyond the surface lines of the patented claim. But for so much of the lode as has its apex within the surface limits, as found within the end lines of the patented ground, the extralateral rights were granted to the patentee in express terms. It therefore follows that when the defendant introduced its patent, proved the course of the lode lengthwise within the surface limits of the patented ground, and that all the ore which it had extracted from beneath the surface ground of the Irish-American claim was taken from said lode, as set forth in the findings, it clearly, and beyond all question, established its right to the ores thus taken out. No further proofs were required.

2. It appears from the patent, and is shown in the diagram, that the mining ground patented varies in width from 650 to 1,250 feet, and it is therefore claimed by plaintiff in error that the patent is void upon its face; and *Lakin* v. *Dolly,* 53 Fed. 333, and *Lakin* v. *Roberts,* 4 C. C. A. 438, 54 Fed. 462, are cited and relied upon in support of this contention. Every case must be considered with reference to its own peculiar facts. The *Lakin Cases* did not involve any construction of the law appertaining to the extralateral rights of the lode patented to the Mammoth Gold-Mining Company. The lode, neither in its length or depth, was involved. It was only the surface ground that was in dispute. The patent in those cases embraced two separate mining locations, and conveyed 4,100 feet of a gold-bearing quartz lode, with 252.95 acres of land. The lode, as located and fixed on the surface of the ground, was in a straight line along the northwest boundary of the patented tract, and was within 50 feet of said line. The surface tract covered by the patent, except said 50 feet, was on the southeast side of said lode, and extended about three-quarters of a mile therefrom. Under the rules and regulations of the mining district where said lode was situated, the locator was entitled to only 100 feet of ground on each side of the lode; and, under the laws of the United States (Rev. St. § 2320), the amount of surface is restricted to 300 feet. The question there was whether, by virtue of the surface ground, the owner of the mining claim could include real estate within the surface boundaries situated more than 300 feet distant from the lode. Upon the facts the court held that under the provisions of section 2320, Rev. St. U. S., the land department had no jurisdiction, power, or authority to issue a patent to a quartz lode for any surface ground exceeding 300 feet in width on each side of the middle of the vein or lode, and that any patent that is issued for more than that amount of surface ground is absolutely null and void as to the excess over 300 feet, and that the patent might be

collaterally attacked in a court of law. It will thus be seen that there were no principles of law involved in those cases which have any application whatever to the case at bar. In this case the plaintiff in error does not claim any right whatever to the surface boundaries of the North Star claim, as patented; and it is a well-settled and elementary principle of law that the possession of this surface ground by the defendant in error is sufficient evidence of title, as against any one not showing any higher or better right thereto. Moreover, even if the principles of the *Lakin Cases* could be considered, remotely or otherwise, as having any application to the present case, still the defendant in error would be entitled to the vein or lode, which was proved and established in this case, and to the surface ground for 300 feet on each side of the center of the lode; and this is all that is required to give the party the extra rights which are provided for by the statute.

3. The plaintiff in error contends that, if the patented area of the North Star is to be considered as a location, its end lines are not parallel, as found by the court, and that under section 2320, Rev. St., the defendant in error possesses no extralateral rights under it. The act of 1866, under the provisions of which the patent in this case was applied for, and under which the rights of defendant in error accrued, did not require parallelism of end lines. *Walrath* v. *Mining Co.*, 63 Fed. 552, 556. Under this act, "however tortuous might be the course of the lode, the claimant had a perfect right to follow it up, and prepare his diagram so as to include it, together with the surface ground on each side thereof allowed by local laws. There is no language in the act that requires the diagram to be in the form of a parallelogram, or in any other particular form." *Wolfley* v. *Mining Co.*, 4 Colo. 112, 116. Moreover, the end lines, as marked on the diagram converge in the direction of the dip; giving the patentees less of the vein or lode, in depth, than they had at the surface. The object of the act of 1872 in requiring parallelism of end lines

was intended to give to the claimant of the lode as much of the lode or vein in its downward course as he has at the surface, but no more. It appears from the findings that the defendant in error was only allowed 2,200 feet of the apex of the lode, because it was cut off on the west by a "crossing," as shown on the diagram. The restriction of its rights in these particulars cannot be complained of by the plaintiff in error.

From any legal standpoint from which the facts of this case can be considered, it is apparent that the judgment of the circuit court in favor of the defendant is correct. The judgment of the circuit court is affirmed, with costs.

CHARLES MURRAY ET AL. V. C. TINGLEY ET AL.

(20 Montana 260; 50 Pac. 723. Supreme Court. October 25, 1897.)

[1]Verification of statutory ditch notice. Relation. The notice of location of a water right is fatally defective unless verified as required by statute. But an actual appropriation of the water to a beneficial use is valid without such compliance, the only effect of the statute being to give the benefit of relation back to date of posting, when such statutory notice is made and verified.

Where there are two claimants neither of whom complies with the statute the one who first completes the appropriation, not the one who first began his ditch, has the prior right.

An amendment on account of the exclusion of a notice, to aver an actual appropriation of the same water, does not state a new cause of action.

Appeal from District Court, Choteau County; Dudley Du Bose, Judge.

Action by Charles Murray and Louis Murray against C. Tingley and others. From the judgment, defendants and plaintiff Charles Murray, appeal. Reversed and remanded.

[1]A water appropriation relates back to the first act. *Irwin* v. *Strait*, 18 Nev. 436; 4 Pac. 1215. *Water Sup. Co.* v. *Larimer Co.* 24 Colo. 322; 51 Pac. 496.

Delay of one season may be excusable. *Irwin* v. *Strait*, *supra*.

Patent relates back to the location. *Silver Bow Co.* v. *Clark*, 5 Mont. 378; 5 Pac. 570. *Talbott* v. *King*, 6 Mont. 76; 9 Pac. 434.

Lode patent dates back to date of location and cuts out intervening town site patent. *Butte City Smokehouse Lode Cases*, 6 Mont. 397; 12 Pac. 858.

When long delay between discovery and location, record does not relate back to discovery. *Pelican Co.* v. *Snodgrass*, 9 Colo. 339; 12 Pac. 206.

Discovery after location cannot avail by relation. *Upton* v. *Larkin*, 5 Mont. 600; 6 Pac. 66.

An amended location certificate of a void claim does not relate back; otherwise if it be a correction of a mere irregularity. *Moyle* v. *Bullene*, 7 Colo. App. 308; 44 Pac. 69.

On a record made without discovery a relocation certificate will

Statement of the case by the justice delivering the opinion.

This was an action arising from a conflict in claims to the waters of Big Sandy creek, in Choteau county, Montana.

It appears that about May 2, 1888, one Martin commenced a ditch to divert water from said creek for the purpose of irrigating his squatter's claim of 160 acres, some two miles distant. In an attempt to comply with chapter 74, Comp. St. 1887, about May 2d he posted a notice of location at his point of diversion, and about the same time recorded a notice of appropriation. This recorded notice was not sworn to, and, in lieu of the affidavit required by the statute, contained simply an acknowledgment. In July he had extended his ditch to a point some 300 yards from the point of diversion. He had also plowed a furrow from the point where the ditch was incomplete to his land. This was all the work Martin ever did on the ditch. On or about November 19, 1888, he sold and conveyed his ranch and water right to one McDonald, who did not work on the ditch during the time he was its owner. About July 28, 1889, McDonald sold the ranch and water right to Charles Murray. Charles Murray and his brother, Louis Murray, commenced work on the ditch where Martin had left off, in the fall of 1889, and completed it to within a quarter of a mile of the Martin ranch. It was not finished, however, until about the 26th day of April, 1890, at which time water was for the first time conducted on the land. The Murrays used the water through this ditch in 1890, 1891, and 1892, and irrigated certain lands, including the Martin tract. In 1893, 1894, and 1895 the defendants in-

not cut out an intervening discovery. ***Beals*** v. ***Cone***, 27 Colo. 473; 20 M. R. —.

A relocation by the claimant relates back to the original location. ***Fuller*** v. ***Harris***, 29 Fed. 814. But not where the original location was invalid. ***Fisher*** v. ***Seymour***, 23 Colo, 542; 49 Pac. 30.

The doctrine of relation is never invoked to work injustice. ***Gibson*** v. ***Chouteau***, 13 Wall. 101. ***Riddell*** v. ***Animas Canon Co.*** 5 Colo. 230.

terfered with their use of a portion of the waters claimed by them.

On June 7, 1891, Louis Murray posted a notice of location at the point of diversion of the Martin ditch, and filed for record a notice of appropriation, duly sworn to. By these proceedings he attempted to make an appropriation *de novo* of the ditch originally commenced by Martin, and completed by his brother and himself.

It was conceded below, for the purposes of the trial, that the defendants had commenced their ditch about May 20, 1888, for the purpose of irrigating certain unsurveyed agricultural lands held by them about 2½ miles distant from their point of diversion. They had their ditch completed so as to convey water upon their lands in the spring of 1889. It appears that defendants had prepared and recorded on or about May 26, 1888, two notices of appropriation of the waters of Big Sandy creek. These notices were not sworn to as required by the statute, and were acknowledged, simply, just as was the notice which Martin had recorded.

The case was tried to the court without a jury. During the progress of the trial, plaintiffs, the Murray brothers, offered in evidence the notice of location which Martin had recorded. Upon objection the court excluded this notice, the main ground of objection to it being that it was not sworn to. Thereupon the plaintiffs asked leave to amend their complaint so as to set forth that Louis Murray had on June 1, 1891, in compliance with the statute, made an appropriation of the waters diverted by the ditch originally commenced by Martin. This amendment was allowed, over the objection of the defendants; the main ground of such objection being that the amendment changed the original cause of action. Defendants did not avail themselves of the court's offer to allow them time to plead to the new allegations in the amended complaint, but answered and proceeded with the trial. The notice of appropriation recorded by Louis Murray was ad-

mitted in evidence over the objection of defendants. After the plaintiffs had rested, the defendants offered in evidence their recorded notices of appropriation, but the court refused to admit them.

The trial resulted in a decree awarding the plaintiff, Louis Murray, 130 inches of the waters of the creek; the date of his appropriation being determined as of June 1, 1891. The decree denied any relief to the plaintiff Charles Murray and the defendants, on the ground that they had not shown any right to the use of any of the waters of Big Sandy creek. There are two appeals—one by the defendants and the other by the plaintiff, Charles Murray,—from the judgment and an order denying motions for a new trial.

WALSH & NEWMAN, TOOLE & WALLACE, LESLIE & DOWNING, and J. J. DONNELLEY, for appellants.

H. G. MCINTIRE, for respondents.

BUCK, J. The district court properly excluded the notices of location offered in evidence by plaintiffs and defendants. The absence of affidavits was a fatal defect.

The decree is based on the theory that a water right cannot be acquired save by compliance with the statute regulating the appropriation of water. We think the trial judge took an erroneous view of the law. The statutes of this state in reference to the acquisition of water rights are substantially the same as those of California.

Section 1257, div. 5, Comp. St. 1887 (section 1888, Civ. Code, 1895), is as follows:

"A failure to comply with the provisions of this chapter deprives the appropriator of the right to the use of the water as against a subsequent claimant who complies therewith, but by complying with the provisions of this act, the right to the

use of the water shall relate back to the date of posting the notice."

This section is substantially the same as sections 1418 and 1419 of the Civil Code of California. In the Montana section, however, the word "appropriator" is used in lieu of the word "claimant" in the California sections aforesaid. It is insisted that for this reason the Montana statute should be construed in a different manner from that of California. By a reference to the other sections of the Montana act, however, —sections 1255, 1256, div. 5, Comp. St. 1887 (Sections 1886, 1887, Civ. Code 1895),—in which the word "appropriator" occurs in the sense of "claimant," it is manifest that the said word, as used in said section 1257 (1888), is not susceptible of any greater or narrower force than the word "claimant." Hence the two words may be regarded as convertible, and as expressing the same meaning. Therefore no distinction can be drawn between the California water-right act and that of Montana.

In California it is held that a valid water right may be acquired, even when there has been no compliance with the statute, where water has been actually diverted from a stream by means of a ditch, and applied to a beneficial use, in the absence of the inception of any adverse statutory claim. *Wells* v. *Mantes,* 99 Cal. 583, 34 Pac. 324.

In the case of *DeNecochea* v. *Curtis,* 80 Cal. 397, on pages 400, 401, 20 Pac. 563, and 22 Pac. 198, to the same effect, the court expresses its view of the law as follows:

"Sections 1415 and 1416 of the Civil Code read as follows:

" 'Sec. 1415. A person desiring to appropriate water must post a notice in writing, in a conspicuous place at the point of intended diversion, stating therein: (1) That he claims the water there flowing to the extent of (giving the number) inches, measured under a four-inch pressure; (2) the purposes for which he claims it, and the place of intended use; (3) the

means by which he intends to divert it, and the size of the flume, ditch, pipe or aqueduct in which he intends to divert it. A copy of the notice must, within ten days after it is posted, be recorded in the office of the recorder of the county in which it is posted.

" 'Sec. 1416. Within sixty days after the notice is posted the claimant must commence the excavation or construction of the works in which he intends to divert the water, and must prosecute the work diligently and uninterruptedly to completion, unless temporarily interrupted by snow or rain.' "

It may be conceded that, if these provisions of the law stood alone and unqualified, strict, or at least substantial, compliance with their requirements would be, as counsel claims, a *sine qua non* to the acquisition of any right to divert running water from its natural channel. But these provisions do not stand alone.

"Section 1418 reads as follows: 'By a compliance with the above rules the claimant's right to the use of the water relates back to the time the notice was posted.'

"In this provision we begin to see the purpose and object of the legislature, which, in our opinion, was merely to define with precision the conditions upon which the appropriator of water could have the advantage of the familiar doctrine of relation, upon which it had always been held, before the statute, that one who gave sufficient notice of his intention to appropriate, and followed up his notice by diligent prosecution of the work, was, upon its completion, to be deemed an appropriator from the date of his notice, and was therefore prior in time and stronger in right than an intervening appropriator, notwithstanding his diversion of the water might be first completed. We are not, however, left to any doubtful implication to be drawn from section 1418. Section 1419 reads as follows: 'A failure to comply with such rules deprives the claimant of the right to the use of the water as against a subsequent claimant who complies therewith.' This

language clearly and necessarily implies that there is a right to the use of running water, acknowledged by the legislature and cognizable by the courts, which is good against all the world except a claimant who has complied with the rules prescribed in sections 1415 and 1416. Now, what is this right? What can it be, except the right of one who has fully completed the diversion of running water, and applied it to a beneficial use, before the initiation of an adverse right of appropriation under the law, or the acquisition of an adverse right in the land to be affected by the diversion? And why should not such a right be recognized and enforced?"

We think the construction of the statute by the supreme court of California is logical and correct, and are of the opinion that the Montana act should be construed in the same manner. The Montana legislature, in the enactment of said water-right act, intended to regulate the doctrine of "relation back." Prior to its passage, on March 12, 1895, no notice of location or record of appropriation was required. A person acquired a right to the use of water by digging a ditch, tapping a stream, and turning water into it, and applying the water so diverted to a beneficial use. This constituted a valid appropriation of water.

For years before the statute was enacted the rule of law was "that the appropriation of water by persons who prosecute the work on their ditch with reasonable diligence dates back to the commencement of the work." *Woolman* v. *Garringer*, 1 Mont. 535.

Therefore, as between two persons digging ditches at the same time, and prosecuting work thereon, with reasonable diligence, to completion, the one who first began work had the prior right, even though the other had completed his first. This was the doctrine of "relation back."

Questions of priority, however, as well as of the original capacity, etc., of ditches, depended chiefly on oral testimony, —on the memory of eyewitnesses, often at fault through lapse

of time. Confusion and insecurity to vested rights resulted. To obviate this as much as possible, the statute was enacted. It required a notice of location to be posted at the point of diversion, to apprise others who contemplated the acquisition of water rights from the same stream that the locator had taken his initial step to appropriate water. It required a recorded notice of appropriation, in order that a record might be supplied, giving the history in detail of each appropriation, which would inure to the benefit of their successors in interest, as well as to the appropriator's, and not leave them dependent upon the mere memory of witnesses when conflicts should arise. In enacting this law the legislature did not contemplate that one who failed to comply with the terms of the statute, but who, in the absence of any conflicting adverse right, had nevertheless actually diverted water and put it to a beneficial use, should acquire no title thereby. The essence of an appropriation—a completed ditch, actually diverting water, and putting it to a beneficial use—remained the same as it had been before. The object of the statute was to preserve evidence of rights, and also to regulate the doctrine of relation back. It follows that the statute controls this doctrine of relation back, and that one who seeks to avail himself of it since the passage of this act can only do so by a compliance with the statutory requirements.

Again, we are satisfied that the legislature did not intend that one who failed to comply with the statute, but who had nevertheless actually diverted water, could be deprived of it by another who complies with the statute at a time subsequent to the former's completed diversion. See *Wells* v. *Mantes,* 99 Cal. 583, 34 Pac. 324, and *Watterson* v. *Saldunbehere,* 101 Cal. 107, 35 Pac. 432.

Neither appellant Charles Murray nor the defendant appellants complied with the statute, but, as between Charles Murray and the defendant appellants, the right of defendant appellants is a superior one. The latter had their ditch completed, and water flowing over their land, a year before the

former did. Defendant appellants and Charles Murray both acquired valid water rights, despite a noncompliance with the statute; but the right of defendants is superior to that of Charles Murray, although he commenced work on his ditch first.

As to Charles Murray and defendant appellants, Louis Murray acquired no superior right by virtue of his appropriation in 1891.

One other alleged error defendant appellants submit for our consideration, namely, that the trial court, in allowing the amendment it did, permitted one cause of action to be substituted for another.

In the view we have taken of the law applicable to this controversy, whether error was committed or not in this respect is not very material; but we do not think, under the statute regulating the appropriation of water, which expressly provides, in section 1260, that the court may in one decree settle the relative rights of any and all persons who are parties to the litigation, the objection would be well taken if Louis Murray's 1891 appropriation could have availed him (which, however, as has been shown, it could not). It would not have been the substitution of one action for another, so far as Louis Murray was concerned, in such an event.

It was stipulated in the lower court that "the facts conceded to be true in reference to the history of the defendants' appropriation of water were admitted only for the purposes of the particular trial, and without prejudice to the right of either side to contradict or vary the facts so conceded if a further trial should be had."

In view of this stipulation and the error committed, the order of this court is that the judgment be reversed and the cause remanded, with directions to the lower court to grant a new trial and proceed in pursuance with the views herein expressed. *Reversed and remanded.*

PEMBERTON, C. J. and HUNT, J. concur.

ROBERT CHAMBERS v. CHARLES A. SMITH.

(183 Pennsylvania 122; 38 Atl. 522. Supreme Court. Oct. 25, 1897.)

[1]**Lessee compelled to pay right of way through coal bed.** Defendant's lease called for him to pay $1,000 bonus in case he struck a 100 barrel well. He had been sued by the owner of a coal bed which he pierced in sinking, (the coal bed being a severed estate) and had been compelled to buy his peace. *Held*, that this was no defense to a suit for the bonus as the lessor had done no act in breach of any implied covenant for quiet enjoyment.

Facts of the case. The affidavit of defense set up that prior to the lease, lessor had conveyed the underlying coal, reserving the right to drill three wells through it; he had also conveyed certain portions of the surface of his land to various persons without reserving to himself any right to drill upon them. After defendant struck the oil he was sued by the coal-owners and forced to an expensive compromise. *Held*, that the affidavit was no defense.

Appeal from Court of Common Pleas, Washington County.

Action by Robert Chambers against Charles A. Smith on an oil lease. Judgment for want of sufficient affidavit of defense, and defendant appeals. Affirmed.

The affidavit of defense and opinion of the court below are as follows:

Affidavit of defense: "Washington County—ss.: Charles A. Smith, the above-named defendant, being duly sworn, deposes and says that he has a full and complete defense to the whole of the plaintiff's claim, the nature and character of which is as follows:

[1]In an oil and gas lease there is an implied covenant of right of entry and quiet enjoyment for the purposes of the lease. *Knotts* v. *McGregor*, 47 W. Va. 566; 20 M. R.—.

As to the right to bore through mineral strata when the surface and mineral estates are severed see *Armstrong* v. *Auen*, 17 M. R. 392 and notes.

"On September 22, 1890, Robert Chambers, the plaintiff, executed and delivered to the Ohio & Pennsylvania Coal Co. a deed for a tract of coal underneath his land situated in Cecil township, Washington county, Pennsylvania. The said land under which the said coal was situated included the 50 acres subsequently leased by the said Robert Chambers to O. P. Irvine and John Chambers, as set forth in the plaintiff's statement. The said deed is recorded in the recorder's office of Washington county, in Deed Book 160, page 130. In and by the said deed the said Robert Chambers, the grantor, reserved to himself the right to drill three wells for oil and gas through the said coal, said three wells to be so drilled as 'not to conflict in any way with the proper mining of said coal.'

"After the execution and delivery of the above-mentioned deed to the Ohio & Pennsylvania Coal Co., the said Robert Chambers sold and conveyed to Jacob E. Ridgeway a portion of the surface overlying the coal which has been conveyed to the Ohio & Pennsylvania Coal Co. The deed from the said Robert Chambers to Jacob E. Ridgeway is dated July 20, 1891, and recorded in Deed Book 167, page 112. The amount of land conveyed was 5.32 acres. The said Robert Chambers conveyed the 5.32 acres to Jacob E. Ridgeway without reserving to himself any right to drill for oil and gas upon said land so conveyed. The deed from Robert Chambers to the Ohio & Pennsylvania Coal Co., and the deed to Jacob E. Ridgeway, are made part of this affidavit of defense. Subsequent to the said conveyance to Jacob E. Ridgeway, the said Robert Chambers sold and conveyed various other portions of the surface overlying the coal conveyed to the Ohio & Pennsylvania Coal Co. to Baptiste Marle, Mary McKinney, August Bord, F. Pondevigne, Valet Caliste, Emil and Sarah Lipscher, Patrick Fisher, A. Schwab, A. J. Allston, Cornelius O'Rourke, Adolph Hirart, Charles Handal, W. C. Mussellman, John Givandan, John Moureau, Andrew Savage.

"All of said conveyances were made without any reserva-

tion to the said Robert Chambers of the right to drill for oil and gas, and were all made prior to the time of the execution of the lease from Robert Chambers to O. P. Irvine and John Chambers. It is true that this deponent became the owner by assignment of the lease of O. P. Irvine and John Chambers, and that he drilled a well upon said tract of land, which said well was completed on or about the 2d day of February, 1896, and produced in excess of one hundred barrels of oil per day for thirty consecutive days after its completion. Since that first well was completed, ——— wells have been drilled upon the 5.32 acres conveyed to Jacob E. Ridgeway, in neither of which wells has this deponent had any interests; and during the same time a number of wells were drilled upon the lots conveyed by the said Robert Chambers to the parties above named, as herein set forth, and in none of those wells did this deponent have any interests whatever. Subsequent to the completion of the first well by the deponent upon the said tract of land, and while the second well was being drilled, the Ohio & Pennsylvania Coal Co., claiming that the conveyance made by Robert Chambers of the surface overlying the coal conveyed to said company subsequent to the date of the conveyance to the Ohio & Pennsylvania Coal Co., and prior to the time of the execution of the lease above mentioned, under which this deponent was operating, without any reservation of the right to drill the three wells for oil and gas, stipulated for in the deed from Robert Chambers to the Ohio & Pennsylvania Coal Co., had passed his right to drill the said three wells, denied the right of the said Robert Chambers or his lessees or assigns to drill any wells for oil or gas upon the said tract of land embraced in the lease under which this deponent was operating, and threatened to stop by injunction any further developments by this deponent upon said land for oil or gas. . This deponent consulted counsel, and was advised that his right to operate upon said tract of land was, at least,

doubtful, and that it was dangerous for him to risk an injunction being granted, which might ruin his property. A compromise was accordingly effected with the Ohio & Pennsylvania Coal Co., in and by which the said company granted to this deponent the right to drill any number of wells, not exceeding ten, upon said tract of land, by paying the sum of $500 for each well at the time the location was made, and at the same time this deponent paid to the said company $1,000 for Nos. 1 and 2 wells on said farm.

"Subsequently the said Ohio & Pennsylvania Coal Co. filed a bill in equity for an injunction to restrain the further drilling of wells upon the lots conveyed by the said Robert Chambers as hereinabove set forth, which said injunction the court granted.

"Deponent further says that, while the said conveyances hereinabove referred to were all recorded at the time of the execution of the lease under which the deponent is operating, and were, therefore, legal notice, yet this deponent had no actual notice of the matters herein set forth until after the completion of one well upon the said land.

"This deponent therefore says that if, as a matter of law, upon the facts as above set forth, the said Robert Chambers, at the time of the execution of his said lease to O. P. Irvine and John Chambers, had no right to drill three wells, or to drill any wells, upon the said tract of land, and that neither the said O. P. Irvine or John Chambers, nor this deponent, as their assignee, had right, as against the Ohio & Pennsylvania Coal Co., to operate for oil and gas upon said land, then the covenant in said lease to pay $1,000 bonus on said first well was without consideration, and is void. All of which the deponent avers and believes, and expects to be able to prove."

TAYLOR, J., filed the following opinion:

It was admitted on the argument of this case by the de-

fendant that the first well completed under the lease produced one hundred barrels of oil for thirty consecutive days, in which event, "a bonus of one thousand dollars shall be paid to the party of the first part,"—the plaintiff in this suit, brought to recover this one thousand dollars bonus. The affidavit of defense sets out the facts and states the reasons for withholding the payment of this bonus.

Prior to the lease of the plaintiff's land for oil and gas to the defendant's assignors, he had sold the Pittsburg or river vein of coal under said tract of land, the deeds for which were duly recorded, and of record at the time of the lease for oil and gas. In the conveyances of the coal, the owner of all except the coal reserved the right to drill three wells for oil and gas. This right he gave to O. P. Irvine and John Chambers under the lease in suit, who sold the same to the defendant, Smith.

After the first well was completed some time, and a second drilled below the coal, the owners of the coal denied the said defendant's right in law to drill through their vein of coal, and litigation followed between the owners of the coal and oil rights, which resulted in a compromise, to which litigation and compromise the plaintiff in this suit was not a party, or in any particular consulted or concerned. The contention of the defendant is that, the lease for oil and gas containing words of grant, there is an implied covenant for quiet enjoyment under the sixth section of the act of May 28, 1715 (1 Smith's Laws, p. 95), against the grantor, his heirs and assigns. This act refers to any estate of inheritance in fee simple, while the lease in this case is the mere right to operate, to drill—the estate being in the oil when brought to the surface, and only passing when oil is found and brought to the surface. *Venture Oil Co.* v. *Fretts,* 152 Pa. St. 451, 25 Atl. 732; *McNish* v. *Stone,* 152 Pa. St. 457, 25 Atl. 732.

But, assuming the act of May 28, 1715, applies to the lease

in this case, has the lessor, his heirs and assigns, done any act prejudicial to his assigns, defeating or incumbering in any way the right or estate granted?

Whenever the enjoyment of a right or an estate or interest ceases by lawful title, where there is a covenant for quiet enjoyment or against incumbrances, then, and then only, is the covenant broken in such a manner that an action assigning a breach thereof will lie. *Duff* v. *Wilson,* 69 Pa. St. 316.

There are other questions raised by the affidavit of defense, and upon the argument of the case, but we do not think they are sufficient to prevent judgment for the plaintiff. All the conditions and provisions of the lease relating to the drilling of the first well have been fulfilled by both parties thereto, except the payment by the defendant to the plaintiff of the bonus of one thousand dollars for the first well, admitted to have produced one hundred barrels of oil per day for thirty consecutive days, when it became due and payable.

Now, November 23, 1896, this cause came on to be heard, and was argued by counsel, and, after due consideration thereof, it is ordered that judgment be entered for the plaintiff, Robert Chambers, against the defendant, Charles A. Smith, for want of a sufficient affidavit of defense, and the prothonotary is directed to liquidate the sum due from the statement filed in said case.

R. W. IRWIN, J. W. & A. DONNAN, for appellant.

W. S. PARKER and WINFIELD MCILVAINE, for appellee.

PER CURIAM. The only question presented by the assignments of error is whether the court erred in entering judgment against the defendant for want of a sufficient affidavit of defense.

We find nothing in the record that would have warranted

the court in sending the case to a jury. On the contrary, its action in sustaining the motion for judgment is amply vindicated in the opinion sent up with the record; and, on that opinion, the judgment is affirmed.

JANE M. JACKSON v. C. K. O'HARA ET AL.

(183 Pennsylvania 233; 38 Atl. 624. Supreme Court. Nov. 8, 1897.)

[1]"Null and void" clause not self-acting. An oil and gas lease for a term of years provided that, if the lessee failed to complete one well within one month, he should thereafter pay a fixed rental till a well was completed; and that failure to complete such well or pay said rental should annul the lease, the lessee "having the option to drill said well or not, or pay said rental or not, as he may elect." *Held*, that the lessee must drill the well or pay the rent, and could not relieve himself from liability by refusing to do either.

[2]Assignee held for rent. A written assignment of an undivided one-half of the lessee's interest in an oil and gas lease makes the assignee a joint owner of the lease, and jointly liable thereunder with the original lessee.

Appeal from Court of Common Pleas, Allegheny County.

Assumpsit by Jane M. Jackson against C. K. O'Hara and another to recover on a gas lease. Judgment for plaintiff, and defendants appeal. Affirmed.

[1]For full note on this point see *Bartley* v. *Phillips*, 18 M. R. 542.

[2]Assignee by accepting the lease binds himself to keep its covenants. *Edmonds* v. *Mounsey*, 18 M. R. 384. *Woodland Co.* v. *Crawford*, 55 Oh. St. 161; 44 N. E. 1093.

An oral construction of the lease between the lessor and lessee, not known to assignee, cannot be availed of by assignee. *Springer* v. *Citizens N. G. Co.* 145 Pa. 430; 22 Atl. 986. Compare *Bartley* v. *Phillips*, *supra*.

Assignee of lease has a right to same "refusal" allowed to lessee. *Guffey* v. *Clever*, 146 Pa. 548; 23 Atl. 161.

Defendant alleged that he took the oil lease with the express understanding that it was to be assigned to a company about to be formed, to which he had assigned per understanding with plaintiff. *Held*, that he was personally liable. *Sanders* v. *Sharp*, 153 Pa. 555; 25 Atl. 524.

Lessee not released by his assignment and recognition by lessor of his assignee. *Pittsburg Co.* v. *Greenlee*, 164 Pa. 549; 30 Atl. 489.

Where a lessee assigns he cannot reënter for breach of condition by any implied covenant to that effect. *Ohio Co.* v. *Auburn Co.* 64 Minn. 404; 67 N. W. 221.

The court of common pleas delivered the following opinion (WHITE, J.): "The plaintiff made an oil and gas lease to the defendant C. K. O'Hara, dated 29th January, 1891, for the term of five years, and as long thereafter as oil or gas should be obtained in paying quantities. The lessee covenanted 'to commence operations and complete one well within one month, and, in case of failure to complete one well within such time, * * * to thereafter pay as rental to the party of the first part for such delay the sum of $50 per month, payable monthly in advance at the Burgettstown National Bank, Pa.; and the party of the first part hereby agrees to accept such sum as full consideration, liquidation, and payment of all damages for any delays until one well shall be completed; and a failure to complete such well, or to make any of such payments within such time and at such place above mentioned, renders this lease absolutely null and void, and no longer binding on either party, and will revest the estate herein granted in the lessor, and release the lessee from all his covenants herein contained, he having the option to drill said well or not, or pay said rental or not, as he may elect.'

"On 1st May, 1891, O'Hara assigned an interest in the lease to the Ohio Valley Co., as follows:

" 'East Liverpool, Ohio, May 1st, 1891. For a valuable consideration, the receipt of which is hereby acknowledged, I hereby sell, assign, transfer, and set over to the Ohio Valley Gas Co. an undivided one-half (½) interest in and to the foregoing lease, together with my entire gas right in and to the said lease. C. K. O'Hara. [Seal.]'

"No well was ever completed or commenced. The Ohio Valley Gas Company paid the rental for three months, but then ceased, and no more was paid. The contention of the defendant is: First, that the lessees had an option to sink a well, or pay the monthly rental, or to do neither, and by refusing to do either the lease was at an end, and they were relieved from further liability; and, second, in any event,

there is no joint liability of the defendants. On the first contention it is sufficient to say that in *McMillan* v. *Philadelphia Co.*, 159 Pa. St. 142, 28 Atl. 220, on a lease with a clause precisely similar to this, the supreme court held the lessee was not relieved from liability, even when he had tendered back the lease, which was not done in this case.

"The other contention is on the theory that the assignment by O'Hara to the Ohio Valley Gas Co. is in the nature of a subletting, and the gas company is only a subtenant. We cannot sustain that contention. The assignment is a sale of the one-half undivided interest in the lease. The two parties then became joint owners of the lease, and jointly liable to sink the well or pay the monthly rental. In the statement of claim by the plaintiff it is stated that the lease was assigned by O'Hara to the Ohio Valley Gas Company, which implies that O'Hara had parted with all his interest in the lease. Were that the fact, there could not be a joint action. The same general statement is made in the affidavit of defense. But the assignment, made part of the affidavit of defense, shows that it was only a one-half undivided interest that was assigned. In view of these facts, and in order to have the case decided upon its merits, the plaintiff is allowed to amend the statement so as to set forth the assignment as it actually was.

"Rule absolute. Judgment ordered for the plaintiff against the defendants for $3,382.86, being the monthly rentals from June 1, 1891, to January 1, 1896, with interest on each monthly rental to this date."

WILLIAM R. BLAIR, for appellants.

ULYSSES G. VOGAN and W. G. CRAWFORD, for appellee.

PER CURIAM: This appeal is from the judgment entered by the court below against the defendants for want of a suf-

ficient affidavit of defense. For reasons given by the court, we think there was no error in "holding that the facts set forth in the defendants' affidavit of defense" do not constitute a defense to the plaintiff's cause of action, and hence there was no error in making the rule for judgment absolute.

The judgment is affirmed for reasons given in the opinion of the court below.

CAREY C. HARRIS v. OHIO OIL CO.

(57 Ohio St. 118; 48 N. E. 502. Supreme Court. Nov. 23, 1897.)

[1]**Implied covenant to bore additional wells.** Where lands are granted, demised, and let for the purpose and with the exclusive right of drilling and operating for oil and gas, in consideration that a certain part of the oil produced should be delivered to the lessor, the lease providing that one well should be completed within six months, and in default the lease to be null and void, and the lease being silent as to the drilling of other wells or the protection of lines: *Held*, That in such a lease there is an implied covenant on the part of the lessee that he will drill and operate such number of oil wells on the lands as would be ordinarily required for the production of oil contained in such lands, and afford ordinary protection to the lines.

No forfeiture for breach of implied covenant. Where the forfeiture clause in such a lease is to the effect that a failure on part of the lessee to comply with the conditions or pay the cash consideration in the lease mentioned, at the time and in the manner agreed, then the lease to be null and void, and not binding on either party, and oil being produced in paying quantities through wells drilled on the lands by the lessee under the lease: *Held*, that the lessee has a vested interest in the lands; that, to work a forfeiture of the lease, there must be a breach of a condition or covenant which is mentioned in the lease; that a breach of an implied covenant does not work a forfeiture of the lease; and that certain causes of forfeiture being specified in the lease, others cannot be implied.

Remedy in damages. Under such a lease, the remedy for a breach of an implied covenant is not by way of forfeiture of the lease, in whole or in part, but by an action for damages caused by such breach.

(Syllabus by the Court.)

Error to Circuit Court, Wood County.

Action by the Ohio Oil Company against Carey C. Harris. Judgment for plaintiff. Defendant brings error. Affirmed.

[1]See *Kleppner* v. *Lemon*, 18 M. R. 404; 21 M. R. — and notes.

The written instrument, of which the following is a copy, was duly executed by the parties thereto, and properly recorded:

"Memorandum of agreement, made and entered into this 16th of December, 1887, by and between William Snyder and Cordelia Snyder, of Hancock county, Ohio, of the first part, and Carey C. Harris, of the second part, witnesseth.

"That the party of the first part, for the consideration of one dollar and other considerations in hand paid, and the covenants and agreements hereinafter contained, have granted, demised, and let unto the said party of the second part, for the purpose and with the exclusive right of drilling, operating for petroleum, oil, and gas, all that certain tract of land situated in the township of Henry, Wood county, Ohio, known and described as follows: The east half of the northeast quarter of section 14, and the west half of the northwest quarter of section 13, in township three north, range ten east, containing 159 acres, more or less.

"The said party of second part to have and to hold the said premises for the said purpose only for and during the term of five years from the date hereof, and as much longer as oil and gas are found in paying quantities.

"The said party of the second part, in consideration of said grant and demise, agrees to give to the party of the first part the full equal one-sixth part of all petroleum oil obtained or produced on the premises herein leased, and to deliver the same to the pipe line to the credit of the party of the first part.

"It is further agreed, if gas is found in sufficient quantities to utilize, the consideration in full to the party of first part shall be one hundred dollars per annum for each and every gas well drilled upon the premises herein described and so used, and the privilege of using sufficient gas to heat the house on said premises.

"The party of the first part grants the privilege to the

party of the second part of using sufficient water from the premises herein leased, except from wells now on the premises, necessary to the operations thereon, and the right of way over and across said premises to the place of operation.

"The right to lay pipes to convey oil and gas, and the right to move any machinery and fixtures placed on said premises by them.

"Provided, that no well shall be bored nearer than three hundred feet of house or barn or in the orchard, except by consent of the first party.

"Provided, in case no well be completed within six months from date of this lease, unavoidable delays excepted, then this lease shall be null and void unless second party shall pay one hundred dollars to first party for each three months it is delayed.

"Second party agrees to commence and complete one well within six months.

"It is further agreed by party of first part with party of second part, that the failure on the part of the party of the second part to comply with the conditions or to pay the cash considerations herein mentioned at the time and in the manner agreed, then and in that event this lease shall be null and void, and not binding on either party.

"It is understood between the parties hereto that all conditions between the parties hereto shall extend to their heirs, executors and assigns.

"In witness whereof, the parties hereto set their hands, the day and year first above mentioned. [Signed] William Snyder. Cordelia Snyder. Carey C. Harris."

Said Carey C. Harris, having taken possession of said premises under said instrument, and drilled and operated nine oil wells thereon, assigned all his interest in said lease to the Ohio Oil Company, on the 22d day of February, 1889, and delivered possession to said company, and it has been in pos-

session ever since, and has drilled and operated three additional oil wells, and all the wells have at all times produced oil in paying quantities, but have produced no gas.

On the 5th day of January, 1892, said Carey C. Harris purchased said lands from said William Snyder and wife, and he has continued to own the same ever since, so that, in legal effect, he is the lessor, and the Ohio Oil Company the lessee.

The plaintiff in error, Mr. Harris, claimed that at least ten additional oil wells should be drilled upon said lands in order to reasonably and properly develop the same, protect lines, and prevent the wells on the surrounding lands from draining the oil from under his said lands, to his injury; and he notified the company to drill more wells, and notified it that, unless such additional wells should be drilled within a reasonable time, sixty days, that he should regard the lease forfeited as to the undrilled parts of said lands, and should proceed to drill wells on said parts of the lands himself.

The company refused to comply with his notice, and claimed that it had the exclusive right to drill wells on said lands by virtue of said lease. After repeated notices on his part, and refusals on part of the company, he made preparations to drill a well on the undrilled part of said lands; and the company thereupon filed its petition, and obtained a temporary injunction against the defendant below; and he filed his answer, averring that, at the time the lease was made, there existed a well-known custom throughout said county of Wood to the effect following:

"I. That the grantee or lessee should protect the lines of lands so leased or granted for said purpose from wells on adjoining lands—in all cases where on adjoining lands wells were or should be operated so near the same as to draw oil or gas from lands so leased or granted—by drilling and operating wells near the same immediately on lands so leased.

"II. That, upon the completion of the first paying well at the time stipulated in the lease or grant, without delay others must be completed and operated, so as to develop and operate the lands so leased or granted, and particularly so where adjoining lands are being operated.

"III. That, to operate such lands for said purpose, one well, at least, should be drilled and operated on each five acres of the lands so leased or granted for said purpose."

The following averment was also contained in the answer: "That plaintiff owns and operates the lands adjoining said lands in the petition described on every side, and has operated the same ever since the said 22d day of February, 1889; that on the 160 acres on west of said lands, plaintiff owns and operates twenty oil wells; that on the eighty acres on east it owns and operates ten oil wells; that on each of the quarter sections on north, northwest and southwest it owns and operates nineteen oil wells, and within a distance of about one-half a mile from said lands of defendant plaintiff owns and operates over 120 oil wells; that many of said wells are near the lines of defendant's said lands, and draw the oil from under and in his said lands, and do him irreparable injury."

Also the following: "Defendant says the said wells now on said land are located as follows: Six are located along the east line of said farm, at a distance of from thirty to two hundred feet of said line. Four are located along west line of said lands, at a distance of from 200 to 300 feet of said line, of which the north one being 520 feet from the north line of said lands.

"One of said wells is 200 feet from south line, and 700 feet from said east line. One of said wells is about 200 feet west of center of said farm. With the exception of said last well, no drilling has been done on the middle of said farm,—more than eighty acres."

There was an averment in the answer that an oil well

could be drilled and completed in thirty days, and there were also other averments in the answer which are not material here, as the court found them not to be true.

The reply of plaintiff was as follows: "For reply to the answer filed in this cause, the plaintiff admits that oil wells in the Wood county field should be drilled 1,200 to 1,300 feet deep; that a well can be completed, barring accidents, in thirty days; the exclusive right of plaintiff to mine on the lands for oil and gas, so long as the same may be found in paying quantities; the number, location, and dates of drilling the wells thereon; that plaintiff owns and operates wells on adjoining lands, but not to the extent nor in the manner alleged in the answer; that some of the wells on adjoining lands are near the line of defendant's lands; that defendant has requested plaintiff to drill other wells; its refusal to drill the number requested by defendant; that it has prevented, and intends to prevent defendant from drilling on said lands during the continuance of the lease set forth in the petition. It denies every other allegation in the answer."

The cause was tried in the Circuit Court on appeal, and the following decree rendered, to wit: "This day came the said parties with their attorneys, and submitted this cause to the court upon the pleadings and the evidence, and the same was argued by counsel. Upon consideration whereof, and being fully advised in the premises, the court find that all and singular the matters and things alleged in the petition are true; that the matters and things set up by way of defense in the answer and cross petition of the defendant are not true; and that the equities of this cause are with the said plaintiff.

"It is therefore adjudged, decreed, and ordered that the said plaintiff be, and it hereby is, quieted in its exclusive right to drill for and produce oil and gas in and upon the lands described in the petition under the lease mentioned and referred to in the pleadings in this cause; and that the de-

fendant be, and hereby is, perpetually enjoined from drilling for or producing oil or gas upon or in said lands or any part thereof, during the continuance of the said lease, and under the terms thereof, and from in any manner interrupting or interfering with the plaintiff in the exercise of its exclusive right to drill for and produce oil and gas upon said lands; and that the cross petition of the said defendant be, and it is, dismissed."

A motion for a new trial was filed and overruled, and exceptions taken, and a bill of exceptions containing all the evidence was allowed, and made part of the record. Thereupon Mr. Harris filed his petition in error in this court, seeking to reverse the judgment of the circuit court.

A. & F. P. & R. A. BLACKFORD, for plaintiff in error.

M. F. ELLIOTT and TROUP & DUNN, for defendant in error.

BURKET, C. J. The matters and things set up in the answer and cross petition, and expressly admitted to be true by the reply, must be regarded as conceded by the parties, and therefore true, notwithstanding the finding of the circuit court to the effect "that the matters and things set up by way of defense in the answer and cross petition are not true." The case therefore stands the same as if the facts expressly admitted by the reply to be true had been found by the court in addition to the finding as made; and the rights and remedies of the parties must be determined by the terms and conditions of the written instrument, and the facts, both as found by the court and as expressly admitted in the reply.

While the written instrument must be construed in the light of the surrounding circumstances, no new terms or conditions can be injected into such instrument, and no existing terms or conditions can be taken therefrom by averment in a pleading. In *Kellogg* v. *Larkin*, 3 Pin. 123, 56 Am. D. 164,

it is said: "No averment can give to an agreement character it had not, and no admission can take from it the character it had." The effort to bend and change the construction of the written instrument in question, by averments in the pleadings, as to its true construction and meaning, must therefore fail, and the instrument must be construed, and its legal effect declared, from the language used, when read in the light of the surrounding circumstances. The facts found and those admitted by the reply are not such as to bend or vary in any respect the construction or legal effect of the language used in the written instrument, and therefore a consideration of the terms and conditions and legal effect of the written instrument itself is all that is required.

It is not claimed by the plaintiff in error that the oil company is in default as to the one-sixth of the royalty, nor as to the payment for gas, nor as to completing one well within six months, nor as to cash payments for delay. His only complaint is that the company has failed to drill the number of wells necessary to properly develop the lands, and so protect the lines as to prevent wells on adjoining lands from draining the oil from under his lands; and, for this alleged default, he seeks to forfeit the lease as to so much of the land as has not been sufficiently drilled. What are his rights in this regard under the lease? Is he entitled to the remedy he seeks? These questions are fairly made in the record, and are of great interest to the oil producing and oil land interests of the state.

There is no express covenant, condition, or agreement in the lease as to the extent to which the lands should be developed, nor as to the number of wells that should be drilled after completion of the first well. Is there an implied covenant, condition, or agreement as to such development, or as to the drilling of a reasonable number of wells? On principle, it would seem that there is such implied covenant in

the written instrument. When no time is fixed for the performance of a contract, a reasonable time is implied. When a contract for the erection of a house or other structure is silent as to the quality of the materials or workmanship, it is implied that the same should be of reasonable quality. In a lease of a farm for tillage on the shares, it is implied that the tenant shall cultivate the farm in the manner usually done by reasonably good farmers. So under an oil lease which is silent as to the number of wells to be drilled, there is an implied covenant that the lessee shall reasonably develop the lands, and reasonably protect the lines. The development and protection of lines which is thus implied when the lease is silent is such as is usually found in the same business of an ordinarily prudent man,—neither the highest nor lowest, but about medium or average.

We therefore hold, both on principle and authority, that there is an implied covenant in this lease to reasonably develop the lands, by drilling and operating such number of wells as would be ordinarily required for the production of the oil contained in such lands and afford ordinary protection to the lines. *Glasgow* v. *Oil Co.*, 152 Pa. St. 48, 25 Atl. 232; *Koch's and Balliet's Appeal*, 93 Pa. St. 434; *McKnight* v. *Manuf. Gas Co.*, 146 Pa. St. 185, 23 Atl. 164.

The extent of the development and number of wells to be drilled, and as to the protection of the lines, is often, if not usually, expressed in the lease, and that is certainly the better practice. When the extent of the development and protection of lines is provided for in the lease, there can be no implied covenant for further development and protection of lines. The implied covenant arises only when the lease is silent on the subject.

There being such implied covenant in this lease, and conceding, but not deciding, that a breach of that covenant is shown by the record, the question arises as to whether such breach works a forfeiture of the lease in whole or in part, and

as to whether the plaintiff in error could, by notice to the oil company, secure to himself the right to drill oil wells on the undrilled part of said lands.

This lease is, in its terms, an entire contract, without any words of severance; and there is no implication of severance, as is sometimes the case when all wells are to be drilled within a shorter time than the period of the lease. In such cases, even though the lease is in terms a sale of all the oil contained in the lands, whatever oil remains in the undeveloped parts of the land at the expiration of the time in which drilling can be done by the terms of the lease inheres in the land, and lapses into the fee, and remains the property of the landowner; the same as standing trees which are sold to be removed within a given time remain the property of the owner of the land after the expiration of such time. *Clark* v. *Guest,* 54 Ohio St. 298, 43 N. E. 862.

In such case the lease is severable by implication, at the end of the period in which drilling is allowed; but there is nothing in this lease to indicate a severable character, and therefore the rule of law applicable to the breach of conditions of entire contracts would seem to be applicable here. That rule is that a condition must defeat or determine the whole estate or contract to which it is annexed, and not only a part of it, unless otherwise expressed. 2 Cruise on Real Property, 5.

The case of *Masson* v. *Bovet,* 1 Denio, 19, is authority to the effect that a rescission of a contract must be *in toto,* or not at all. See also, *Trimble* v. *Doty,* 16 Ohio St. 129. The same rule of law applies as to forfeitures of contracts.

The rights and remedies of the parties to an oil or gas lease must be determined by the terms of the written instrument, and the law applicable to one form of lease may not be, and generally is not, applicable to another and different form. Such leases are contracts, and the terms of the contract with the law applicable to such terms must govern the rights and remedies of the parties. By the terms of the lease in this

case, the lessor, for a valuable consideration, granted, demised, and let the lands described to the lessee, for the purpose and with the exclusive right of drilling and operating for petroleum, oil, and gas for five years, and as much longer as oil and gas are found in paying quantities.

In this case, as in the case of *Crawford* v. *Oil Co.*, 55 Ohio St. 161, 44 N. E. 1093, it is the land that is granted, demised, and let for the limited purpose and period named in the lease. An instrument in such form is more than a mere license. It is a lease of the land for the purpose and period limited therein, and the lessee has a vested right to the possession of the land to the extent reasonably necessary to perform the terms of the instrument on his part. In this case, possession was delivered to the lessee, and operations commenced, wells drilled, and oil produced in paying quantities; and in such cases it cannot be doubted that the lessee has a vested, though limited, estate, in the lands for the purposes named in the lease. *Venture Oil Co.* v. *Fretts,* 152 Pa. St. 451, 25 Atl. 732.

What the exact rights of the parties were after the execution of the lease, and before oil was found in paying quantities, is now immaterial, because oil was found, and is still being produced, in paying quantities; and for the additional reason that the duty imposed by implication upon a lessee in a leasehold operated for gas cannot be measured by the same rule, applied in the same manner, as in the case of a leasehold operated for oil; the peculiar characteristics of the business of producing and transporting natural gas being such as to distinguish it for some purposes from operations for oil. *McKnight* v. *Gas Co.,* 146 Pa. St. 185, 23 Atl. 164.

While the period of five years that the lease was to run has expired, the lease is still in full force, because it provides that it shall continue as much longer as oil and gas are found in paying quantities. This provision extends and limits the period of the lease to such time in the future as oil and gas shall cease to be produced in paying quantities on said lands.

When that period shall arrive, whether caused by exhausting the oil and gas, or by the permanent abandonment of production, the lease will cease, and the whole estate in the premises will become the property of the owner of the fee, not by forfeiture, but by virtue of the terms of the lease. A breach of the implied covenant to reasonably develop and protect lines does not have the effect to forfeit the lease in whole or in part, nor is it good cause for a court to declare such forfeiture, unless the lease in express terms provides that a breach of such implied covenant shall avoid or forfeit the lease. *Koch's and Balliet's Appeal,* 93 Pa. St. 434; *McKnight* v. *Kreutz,* 51 Pa. St. 232; *Janes* v. *Oil Co.,* 1 Penny. 242; *Blair* v. *Peck,* Id. 247; *Paschall* v. *Passmore,* 15 Pa. St. 295.

It is strongly urged that it is inequitable for the lessee to hold on to his lease, and still fail to so operate the premises as to produce reasonable results, and that he should either reasonably operate the premises or get off and permit his lease to be forfeited. The answer is that, while there is an implied covenant to reasonably operate the premises, there is no implied or express covenant to get off and forfeit his lease for a breach of such covenant. The lease in question provides for a forfeiture for the failure to comply with the conditions, or to pay the cash consideration in the lease mentioned, at the time and in the manner agreed; but the implied covenant, to reasonably operate the premises, is not mentioned in the lease, and is therefore not included in the causes of forfeiture. Some causes of forfeiture being expressly mentioned, none other can be implied. *McKnight* v. *Kreutz,* 51 Pa. St. 232. The remedy for a breach of the implied covenant to reasonably operate the premises is therefore not by way of a forfeiture of the lease in whole or in part, but must be sought in a proper action for a breach of such covenant. *Blair* v. *Peck,* 1 Penny. 247. As to the rule of damages in such cases, see *Bradford Oil Co.* v. *Blair,* 113 Pa. St. 83, 4 Atl. 218. *Judgment affirmed.*

WILLIAM T. MURRAY v. JAMES A. ALLRED.

(100 Tennessee 100; 43 S. W. 355. Supreme Court. Nov. 23, 1897.)

[1]**Petroleum and natural gas are minerals,** within the terms of a reservation of "mines, minerals, and metals," in a conveyance of real estate.

Facts of the case. Land and minerals severed. The common predecessor in title of both complainant and defendant conveyed, in 1853, to one through whom defendant claims, reserving all "mines, minerals, and metals" in and under the land in question. Such grantee and his successors in title, down to defendant, conveyed by general warranty deeds, without any such reservation, but the dates of such subsequent deeds do not appear. Complainant acquired by purchase at judicial sale whatever title such common predecessor and his heirs possessed by virtue of such reservation. In a controversy respecting such title, it was agreed that defendant "and those under whom he claims have been in the actual, open, and notorious possession of such land, under color of title, for more than seven years, claiming adversely to the world to the extent of their title papers, which definitely identify the land intended to be conveyed." *Held*, insufficient to show seven years of adverse possession after the deed made by such first grantee to the third person forward, as the expression, "those under whom he claims," includes not only such first grantee, but his grantor as well, under whom complainant also claims.

[2]**Possession of land by the owner of the surface is not adverse** to the owner of minerals therein, when the land is used merely for agricultural purposes, without any denial of the right to the minerals or any assertion of claim inconsistent therewith.

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[1]Oil is a mineral; is real estate. *Kelley* v. *Ohio Co.* 57 Ohio St. 317; 49 N. E. 399.

Its peculiar incidents described. *Marshall* v. *Mellon*, 18 M. R. 548.

Covenant not to bore on parcel of the demised oil ground. The excepted portion is still part of the lease. *Brown* v. *Spilman*, 155 U. S. 665.

Reservation in a coal lease of certain ground means not only the surface but the coal. *Oskaloosa College* v. *Western Union Co.* 90 Ia. 380; 54 N. W. 152.

Includes not only surface but everything beneath it. *Id.*

[2]*Lulay* v. *Barnes*, 172 Pa. 331; 34 Atl. 52. *Virginia Co.* v. *Kelly*, 18 M. R. 395.

Appeal from Chancery Court, Fentress County; T. J. Fisher, Chancellor.

Agreed case by William T. Murray against James A. Allred, submitted to the Chancellor. There was a decree in favor of defendant, which was reserved by the court of chancery appeals, from which judgment defendant appeals, and assigns errors. Affirmed.

L. T. SMITH and W. T. MURRAY, for Murray; JAMES A. ALLRED, for Allred.

WILKES, J. This cause was decided for defendant by the chancellor, and his decree was reversed by the court of chancery appeals, and the cause is now before us on appeal of defendant and assignment of errors.

The very interesting question is presented whether petroleum oil is a mineral or not. It arises upon the construction of a deed which conveyed certain lands, reserving to the

Where there is a reservation of minerals, any surface right claimed as incidental must be strictly construed. *Erickson* v. *Michigan L. Co.* 50 Mich 604; 16 N. W. 161.

Where a deed provides for compensation for use of surface by the miner the surface owner cannot maintain ejectment for the surface occupied. *Id.*

Where the surface and oil rights in several adjoining parcels have been severed, the owner of the reservation of mineral rights cannot use the surface of one to get at the minerals under the other. *Dietz* v. *Mission Co.* (Cal.) 25 Pac. 423.

The surface owner may recover in ejectment against the mineral proprietor who occupies the surface in prosecution of a right which does not belong to him. *Id.*

Customary mode of mining and lessors own understanding of what the lease meant held not sufficient to deprive the surface of the right of support. *Heckscher* v. *Sheaffer*, (Pa.) 14 Atl. 53.

A reserve of mines implies a reservation of the right of access from the surface. *In re Gerrard*, 1 Q. B. (1895), 459.

grantor "all mines, minerals, and metals in and under the land." Subsequent conveyances were made to third persons without reservation, and the present owners hold under a deed conveying in fee simple, and making no reservation and no reference to "mines, minerals, and metals in and under said land."

The chancellor was of opinion that petroleum was not embraced in the term "minerals." The court of chancery appeals reversed this holding in a very exhaustive, elaborate, learned, and able opinion, and cite the dictionaries, legal and otherwise, the encyclopedias, and many works of science, and a large array of legal authorities holding to the same effect, and they state that, after a most exhaustive search, they have been able to find but one case holding a contrary doctrine. We can neither elaborate nor improve upon the holding of the court of chancery appeals, and are content to affirm their holding and adopt their opinion as our own.

It is next said that the present owners are protected in their fee-simple title to the land by the statute of limitations of seven years. The cause was heard upon an agreed statement of facts, and the agreement upon this feature of the case is that defendants, and those under whom they claim, have had the adverse possession of the land for more than seven years. Inasmuch as the complainant's vendor, Rodgers, is one of the parties through whom defendants claim, and the agreed statement of facts does not show how long the land has been held since complainant parted with the title, the facts necessary to sustain the plea are not made out. In addition, it is well settled that one person may own the surface or soil, and another the minerals and mines and metals, and even the water, and there may be different owners for the several different strata under the earth. In order to make a holding adverse to one who has reserved or had granted to him the "mines, minerals, and metals," there must appear to have been some denial of his right or assertion of claim inconsistent with his

right. This does not necessarily appear when a party uses the land merely for agricultural purposes,—a use entirely consistent with the right to mine under the soil by another.

Upon all the points raised we are of the opinion that the court of chancery appeals is correct, and their decree is affirmed and the opinion of that court, delivered by Judge M. M. Neil, is appended, and made the opinion also of this court.

The following is the opinion:

"NEIL, J. The questions in this case arise from the following agreed state of facts:

" 'We, William T. Murray, as complainant, and James A. Allred, as defendant, have a controversy over certain rights in the tract of land hereinafter described, which we desire to settle by an agreed case made upon the following agreed state of facts, which case we agree to submit to the chancery court at Jamestown for a decision. In this case the following facts are agreed, to wit:

" '(1) It is agreed that John B. Rodgers, on the 24th day of October, 1853, sold and conveyed to Mathias Wright a certain tract of land in the 13th civil district of Fentress county, Tenn., bounded and described as follows: [Here described],—in which deed said John B. Rodgers reserved to himself, his heirs and assigns, all mines, minerals, and metals in and under said land. Said Wright conveyed said land by general warranty deed, without any reservation of said mines, minerals, and metals, and whatever title said deed communicated, under the facts hereinafter set out, passed to the defendant, James A. Allred, to the portion claimed by him, by regular chain of conveyances from Rodgers through Wright and others, which purported to convey an estate in fee, except the deed from Rodgers to said Wright, which reserves the mineral interest as above stated. And said Allred, and those through whom he claims, have been in the actual, open, and notorious possession of said land, under color of title, for more than seven years, claiming adversely to the world to the

extent of their title papers, which definitely identify the land intended to be conveyed; but had not been operating, or intending to operate, in any mining business on said land since the date of the deed from John B. Rodgers to Wright; neither has any of his vendors attempted to mine on said land or drill for petroleum oil or natural gas. There is no mineral in, under, or on said land, unless petroleum oil or natural gas is held to be such. That petroleum oil had been discovered in White county, Tenn., and in Wayne county, Ky., or Scott county, Tenn., at what is known as the Martin Beaty well, prior to the deed from John B. Rodgers to Mathias Wright, above referred to. And there are petroleum oil springs in the vicinity of this land which had been discovered at the date of said deed from Rodgers to Wright.

" '(2) That said John B. Rodgers, during his life, and his heirs after his death, have claimed said mines and minerals and metals, including petroleum oil and natural gas, until the same passed out of them, and passed into William T. Murray by judicial sale, who now owns whatever title they owned in said land before said sale.

" '(3) The said William T. Murray, by his agent, went onto said portion of the land last mentioned in said Rodgers' deed, claimed by said Allred and proposed to drill for petroleum oil and natural gas, and was refused the right to do so by said Allred, who conveyed the same to one Lewis Choate, and warranted the title, the said Allred contending that complainant had no interest in said land—(1) because the words "mines, minerals, and metals" do not include petroleum oil and natural gas; (2) if they did, the title of said mines, minerals, and metals has long since been barred by the adverse holding under said deeds.

" '(4) Complainant, Murray, contends that petroleum oil and natural gas are included in the words "mines, minerals, and metals," and especially so as there is nothing else for the reservation to operate upon, and that the possession of said

Allred, and those through whom he claims, does not extinguish the title of the said mines, minerals, and metals, (1) because the facts stated, which are relied upon to effect the bar of the statute of seven years, are not sufficient to establish the character of adverse holding that would effect a bar of his rights or perfect the title of defendants; (2) because their possession was consistent with the complainant's title; (3) the said Murray contends that no cause of action would accrue in such case until the adverse holder invaded mineral rights, and that the cultivation of the soil was not such invasion, and therefore no statute of limitations runs as to said reservation.

" 'And it is further agreed that the Honorable T. J. Fisher, chancellor of the 5th chancery division of the state of Tennessee, may pass upon said facts, and render such decree as the law and the facts may warrant. The chancellor and the supreme court, in case of appeal, will consult any and all scientific works and definitions of the words "petroleum oil" and "natural gas," as well as such legal authorities as are found, to aid them in the determination of the question upon the state of facts submitted.' Proper affidavit was attached.

"Upon this state of facts the chancellor decreed as follows: That the words "mines, minerals, and metals" did not include oil and gas; also, that there had been seven-years adverse holding under the deeds purporting to convey an estate in fee, and this vested the defendant with a perfect title in fee, including the title to oil and gas, and that the adverse holding of James A. Allred, and those under whom he claimed, had extinguished the title of John B. Rodgers, claiming under the adverse reservation as to the mines, minerals, and metals. He thereupon dismissed complainant's case, and rendered judgment against Murray for the costs. An appeal was prayed and granted and errors were assigned as follows:

" '1. The chancellor erred because he did not find, as a matter of law, that the deed from Rodgers to Wright ex-

pressly reserved to himself all of the petroleum oil interest in the land conveyed, and that by the subsequent judicial sale Rodgers' title in the same vested in complainant.

" '2. The court erred because he did not hold, as a matter of fact, viz.: It not appearing at what time Wright sold the land, and consequently it not appearing how much of the time that the land was adversely held was by Wright under his deed from Rodgers, which deed made the reservation, therefore it does not appear as a fact of record that the defendant has held possession of the land for seven years next before this suit was brought, under deed purporting to convey the entire estate in the land. This fact not affirmatively appearing, the defense of the statute of limitations must fail.

" '3. The court erred because it does not hold that, as a matter of law, the possession of the defendants was consistent with complainant's title, and that, there being a double ownership in the land, no cause of action could accrue in his favor so long as the owner of the surface only exercised his legal rights. The statute of limitations does not begin to run until the mineral rights in the land were invaded.'

"The first question to be determined is whether petroleum oil is included within the language of the reservation of 'mines, minerals and metals.' In the Century Dictionary 'petroleum' is defined: 'An oily substance of great economical importance, especially as a source of light, appearing naturally oozing from crevices in rocks, or floating on the surface of water, and also obtained in very large quantities in various parts of the world by boring into the rock; rock oil.'

" 'Various opinions have been expressed concerning the origin of petroleum,' says Prof S. F. Peckham in the American Cyclopedia. 'Until quite recently all of these theories were based upon the assumption that it had been derived from vegetable or animal organisms. Some have supposed that it is the product of the decomposition of woody fiber, by which more of the carbon and less of the hydrogen has been evolved

than by the decomposition which has produced coal. Again, it has been supposed to be the product of the natural distillation of pyrbituminous shales and coals. Lesquereux attributes its origin to the partial decomposition of low forms of marine vegetation. Berthelot has advanced the theory that, by the complex chemical changes at present taking place in the interior of the earth, petroleum is continually set free. It may be assumed that petroleum is a normal or primary production of the decomposition of marine or vegetable organisms, chiefly the former, and that nearly all other varieties of bitumen are products of a subsequent decomposition of petroleum, differing both in kind and degree. The occurrence of petroleum in the lower paleozoic rocks of Pennsylvania and Canada, which contain no traces of land plants, shows that it has not in all cases been derived from terrestrial vegetation, but may have been formed from marine plants or animals,—an opinion further strengthened when we find in the rocks of the tertiary age, in which fossil remains of the higher marine animals occur in abundance, a petroleum comparatively rich in nitrogen.' It is shown, also, in the same authority, that petroleum is procured by a process of mining; that is, by the sinking of wells. It is said that productive wells vary greatly in depth. In some, large supplies have been afforded at 60 and 70 feet, and in others at greater depths, to over 1,000 feet. It is said that most of the oil is obtained from wells over 180 feet deep; that shallow wells, exhausted by pumping, are successfully made to yield again by sinking them deeper; that the oil is found at several zones or oil-producing depths; that the pumps are sunk deeper into the well as the supply goes down. And he continues: 'It is observed that, if the pumping is interrupted for a day, the product obtained when it is renewed will be water which is more or less salt. At some wells the flow of water has continued during several days' pumping before the oil is recovered. This never seems to fail entirely, unless it be from some obstruction arresting

the flow, and then recourse is had to sinking deeper or enlarging the bore of the hole. Salt water commonly comes up with the oil, and is separated from it by standing in the vats into which the products are received. The proportion of this oil is very variable, and the quantity of the oil pumped from a single well is far from being regular. Sometimes the oil, when first struck, rushes up with great violence, by reason of the carbureted hydrogen gas that accompanies it. This produces a spouting or flowing well, from some of which the yield has been more than 1,000 barrels a day for a long time; but the quantity gradually diminishes until they cease to be flowing wells, and they are then pumped. In a few instances the oil has leaped forth with such violence as to be beyond control, and immense quantities have been lost. These fountains of oil have sometimes taken fire, producing terrific conflagrations and presenting scenes of appalling grandeur.' "

"Clearly, from this description of the substance, it could not in any sense fall under the terms 'metal' or 'metallic.' The question, then, to be determined, is, does it fall within the term 'mines and minerals'? In 2 Rap. & L. Law Dict. p. 821, it is said: 'In the most general sense of the term, minerals are those parts of the earth which are capable of being got from underneath the surface for the purpose of profit. The term, therefore, includes coal, metal ores of all kinds, clay, stone, slate, and caprolites. (Surface means that part of the land which is capable of being used for agricultural purposes. *Midland Rail. Co.* v. *Checkley,* L. R. 4 Eq. 19; *Hext* v. *Gill,* 7 Ch. App. 699; *Attorney General* v. *Tomline,* 5 Ch. Div. 762.) A mine is a work for the excavation of minerals, by means of pits, shafts, levels, tunnels, etc., as opposed to a quarry, where the whole excavation is open. While unreserved, minerals form part of the land, and as such are real estate. When severed, they become personal chattels.'

"In 15 Am. & Eng. Enc. Law, at page 500, the following occurs: 'Mineral originally signified that which is obtained

from a mine; from underground mining, as distinguished from that which is quarried. The term is not limited to metallic substances, but includes salt, coal, paint, stone, and similar substances,'—citing, on the last point, *Hartwell* v. *Camman,* 10 N. J. Eq. 128; 64 Am. D. 448.

"In that case the question was whether the mineral stone paint passed under the terms 'mines and minerals.' Upon this question the court in that case says: 'The character of the substance of stone paint, as the witness called it, is given in the bill, and the correctness of the description there given is admitted in the answer and confirmed by the evidence. It is a substance similar in general appearance to red shale; so soft as to be easily cut with a knife when first excavated, but differing in appearance from the surrounding earth. It is found in regular strata or bowlders of different sizes. It hardens when exposed to the air, and when broken up and ground it is used as a paint, and is valuable for that purpose. The manner in which it is procured from the earth, and its particular location below the surface, are particularly described by a witness who was the foreman in carrying on the works. They commenced working in an old shaft which had been used for raising copper ore. As they proceeded with the excavation, the depth of the paint stone was about one foot in eight or ten, perhaps a little more. At the point of the pit opposite to the side at which the excavation was commenced the paint stone was from 18 to 20 feet from the surface of the earth. The work was carried on by making regular mine shafts of timber, one of which was extended about 56 feet in length, and penetrated about twelve feet into the mountain beyond the open pit. Others were made very similar in character. The stratum of paint stone in the largest pit was found to vary from 6 to 15 feet in thickness. The stratum was uniform, increasing in thickness as progress was made into the mountain. It does not crumble like red shale, but comes off in square pieces. It is ground in a mill,

and is fit for use as a paint by mixing it with oil. Its value is from $20 to $30 per ton. Prof. Doremus is the only scientific witness examined. He says: "It may be called an argillaceous sandstone, alumina and silica being the prominent ingredients. It is not an ore of iron. This comes under the head of argillaceous rocks. I wish to distinguish these classes from ores or metalliferous rocks. The position of this paint material, as it lies in the mountain, is not in veins, but is in strata. The extracting of this material, as I saw it there, would not be called mining." '

" 'The analysis,' the court continues, 'only establishes a fact that it is not a metalliferous ore. If the terms mines and minerals, used in the deed, could, by any fair construction, be confined to metallic substances, the question involved would be of easy solution; for the metallic property found in this paint stone is so small that, for the purpose of extracting the metal, it is of no value. But I do not think the terms should be confined to the metals or metallic ores. I cannot doubt if the strata of salt, or even a pit of coal, had been found, they would have passed under this grant.

" 'Can this stone paint, then, be fairly and naturally embraced in the term mineral? It is a body which is destitute of organism and which naturally exists within the earth. It is below the surface, distinguished from the ordinary earth. It is in strata, and is acquired by ordinary means of mining. Also, Prof. Doremus says that it is not in veins, but in strata, and that he would not call the mode of extracting it mining, yet this test of it would exclude salt from the class of minerals; for salt, too, is found in strata, and not in veins, and is obtained by shafts, and by the same mode of operation by which this matter is excavated from the earth. It is valuable for its mineral properties, and, by a cheap and easy process of grinding, is converted into a merchantable article adapted to the mechanical and ornamental arts. It is embraced in the definition given by men of science to the term

mineral. In Bakewell's Mineralogy, p. 7, it is said: 'The term mineral, in common life, is generally applied to denote substances dug out of the earth or obtained from mining.' In Cleveland's Mineralogy, p. 1, the definition is given thus: Minerals are those bodies which are destitute of organism, and which naturally exist within the earth or its surface.' My conclusion is that this paint stone passed by the grant, and that the defendants have the right to excavate and use it, and convert the same to their own use.'

"In a note in the case of *Dunham* v. *Kirkpatrick,* appearing on page 698, 47 Am. Rep., the following appears: 'Freestone is a mineral, within a reservation in a deed. *Bell* v. *Wilson,* L. R. 1 Ch. App. 303. Coal oil is a 'mineral product.' *Thompson* v. *Noble,* 3 Pittsb. 201. Petroleum is a 'mineral, and a part of the realty.' *Stoughton's Appeal,* 88 Pa. St. 198. Coal is a 'mineral.' *Henry* v. *Lowe,* 73 Mo. 96. In *Tucker* v. *Linger,* 46 Law T. (N. S.) 894, it was held that flint stones turned up by the plow in the course of husbandry were 'minerals,' within a reservation to the lessor of 'mines and minerals, and quarries of stone, brick earth, and gravel pits.' This holding was affirmed by the house of lords, 8 App. Cas. 508. In *Earl of Rosse* v. *Wainman,* 14 Mees. & W. 859, the court said that the word, 'though more frequently applied to substances containing metals, in its proper sense, includes all fossil bodies or matters dug out of mines.' And in *Darvill* v. *Roper,* 3 Drew. 294, it was restricted to such products as are worked by means of mines. More recently, however, in *Hext* v. *Gill,* L. R. 7 Ch. App. 699, the natural meaning of the term was said to be: "Every substance which can be got from underneath the surface of the earth for the purpose of profit." Again, it has been held to include beds of china clay, while, on the other hand, freestone, quarries of limestones, and clay and sand, respectively, have been decided not to be 'minerals.' *In Re Dudley's Settled Estates,* Ch. Div., it was held that a

lease of salt works, where the brine was pumped from the earth and was made into salt, was not a lease of minerals.'

"In the case of *Williamson* v. *Jones* (W. Va.) reported in 25 L. R. A. 222, the following language is used by Mr. Justice Holt: 'The authorities now very generally—universally, so far as I have examined them—hold petroleum to be a mineral, and as such a part of realty, as timber, coal, or iron ore, except that in proper cases its mobility as a subterranean liquid must be taken into consideration, as in the case of salt water, etc. The courts of the state of Pennsylvania have had many cases, some involving rights of great value, in which the point arose, and have examined the question thoroughly, considering it with great care with reference to its being property where it is found, and its character and nature in general as property.'

" 'Oil is a mineral, and being a mineral, is a part of the realty.' *Funk* v. *Haldeman* (1866) 53 Pa. St. 229, 249.

"In the case of *Westmoreland Gas Co.* v. *De Witt,* 130 Pa. St. 235, 18 Atl. 724, the master said: 'Gas is a mineral, and while in situ is a part of the land, and therefore possession of the land is possession of the gas.' After quoting this, the court said: 'This deduction must be made with some qualifications. Gas, it is true, is a mineral, but with peculiar attributes, which require the application of precedents arising out of ordinary mineral rights with much more careful consideration of the principles involved than of the mere decisions. Water is also a mineral, but the decisions in ordinary cases of mining, etc., have never been held as unqualified precedents in regard to flowing, or even percolating, waters. Water and oil, and still more strongly gas, may be classed by themselves, if the analogy be not too fanciful, as minerals feræ naturæ. In common with animals, and unlike other minerals, they have the power and tendency to escape without the volition of the owner. Their fugitive and wandering existence, within the limits of a particular tract, is uncertain, as said by Chief

Justice Agnew in *Brown* v. *Vandergrift,* 80 Pa. St. 147, 148. They belong to the owner of the land, and are part of it, so long as they are on or in it, and are subject to his control; but when they escape, and go into other land or come under another's control, the title of the former owner is gone.'

"We have found only one authority opposed to the conclusion that petroleum is a mineral; that is the case before referred to, of *Dunham* v. *Kirkpatrick,* 101 Pa. St. 36; 47 Am. Rep. 696. The great weight of authority is not only opposed to that case, but it seems to us to proceed upon false principles. The ground of the decision, as stated in the opinion, is that by the bulk of mankind nothing is considered as mineral except such things as be of metallic nature, such as gold, silver, copper, lead, etc. That, in the popular estimation petroleum is not regarded as a mineral substance any more than is animal or vegetable oil; and that it could only be classified as such in the most general and scientific sense. So, in the light of this assumed general view of the bulk of mankind, petroleum was held not to fall within a reservation as to minerals. We think, however, that the true meaning of the word mineral, as well as its meaning among the bulk of mankind, must be determined from dictionaries and other similar authorities. We do not think that the bulk of mankind could be regarded as holding that the word mineral applied only to metals. This case seems to be opposed in principle by the later case of *Gill* v. *Weston,* 110 Pa. St. 313, 1 Atl. 921, where petroleum was held to be a mineral substance in construing the Pennsylvania act of 1855, concerning the mortgaging of terms on mining lands. The court said in that case: 'It is a mineral substance obtained from the earth by the process of mining, and lands from which it is obtained may, with propriety, be called mining lands.'

"In the light of these authorities, we are bound to hold that petroleum is a mineral, and that it falls within the terms of the reservation in the deed referred to in the foregoing case.

The same is true of natural gas. We are of the opinion that the first assignment of error, therefore, is well taken. We are of the opinion, also, that the second assignment of error is well taken. To resolve the point raised by this assignment of error, we must construe the agreed state of facts. From this state of facts it appears that Rodgers conveyed the land, with the mineral reservation, on the 24th day of October, 1853, to Mathias Wright, and that Wright conveyed the land by general warranty deed, without any reservation, to some third party, and then it passed through a series of conveyances to James A. Allred; but the date of the deed made by Wright is not given, nor the date of any other deed, nor how long Allred held after Wright's deed. It thus does not appear from the agreement that there was seven years' adverse possession from the date of the deed of Mathias Wright. The agreement is that Allred, and those under whom he claims, have been in the actual, open, and notorious possession of the land under color of title for more than seven years, claiming adversely to the world to the extent of their title papers, which definitely identify the land intended to be conveyed. Within the expression, 'those under whom he claims,' is not only included Wright, but Rodgers. Therefore it is impossible to say that there was seven years of adverse possession from the deed made by Wright to the third person forward.

"We are of the opinion, also, that the third assignment of error is well taken. In mineral lands the surface, as adapted to cultivation, may be separated from the right to dig under its surface for ore, and one person may hold one of these rights while another holds the right of the other. *Sherrod* v. *Chadwick,* 8 Iowa, 463; *Caldwell* v. *Fulton,* 31 Pa. St. 475. So the possession of the soil by the owner for the purpose of tillage gives him no possession of the gas under the surface or of the other minerals. *Westmoreland Gas Co.* v. *De Witt,* 130 Pa. 235, 18 Atl. 724; *Chartiers Coal Co.* v. *Mellon,* 152 Pa.

286, 25 Atl. 597. In this case it is said: 'The mining of coal and other minerals is constantly developing new questions. Formerly, a man who owned the surface owned it to the center of the earth; now the surface of the land may be separated from the strata underneath it, and there may be as many different owners as there are strata. *Lillibridge* v. *Coal Co.*, 143 Pa. St. 293, 22 Atl. 1035. * * * In the early days of the common law the attention of buyers and sellers, and therefore the attention of the court, was based upon the surface proper, and who owned the surface owned all that grew upon it and all that was buried beneath it. His title extended to the clouds and downward to the center of the earth. The value of his estate lay, however, in the arable qualities of the surface, and, with rare exceptions, the income of it was agriculture. The comparatively recent development of the science of geology and mineralogy, and the multiplication of mechanical devices for penetrating the earth's crust, have greatly changed the uses and the values of lands. Tracts that were absolutely valueless, so far as the surface was concerned, have come to be worth many times as much per acre as the best farming lands in the commonwealth because of the rich deposits of coal or iron or oil or gas known to underlie them at various depths. These deposits, however, are sometimes found beneath well-cultivated farms, so that the surface has a large market value apart from the value of deposits of coal or iron, or other minerals under it. In such cases the owner is rarely able to utilize the lower strata of wealth to which he has title, and for this reason he sells them to some person or corporation to be mined and to be moved. So it often happens that the owner of a farm sells the land to one man, the iron or oil or gas to another, giving to each purchaser a deed or conveyance in fee simple for his particular deposit or stratum, while he retains the surface for cultivating purposes precisely as he held it before. The severance is complete for all legal and practical purposes. Each of the separate layers

or strata becomes a subject of taxation, of incumbrance, levy, and sale, precisely like the surface.' "

The result is that the decree of the chancellor must be reversed, with costs, and a decree entered here affirming the decree of the court of chancery appeals for the complainant in accordance with this opinion.

MONTANA ORE-PURCHASING CO. v. BOSTON & MONTANA CONSOLIDATED COPPER AND SILVER MINING CO.

(20 Montana 336; 51 Pac. 159. Supreme Court. December 1, 1897.)

[1]The junior patentee cannot follow on its strike a vein apexing within the area of ground excluded in favor of a prior patent.

Appeal from District Court, Silver Bow County; John Lindsay, Judge.

Application by the Montana Ore-Purchasing Company against the Boston & Montana Consolidated Copper & Silver Mining Company for an injunction. From an order denying such application, and refusing to grant an injunction pending the final determination of the action, plaintiff appeals. Affirmed.

Statement of the case by the justice delivering the opinion:

The owner of the Rarus quartz lode patented mining claim seeks to enjoin the owner of the Johnstown quartz lode patented mining claim from extracting ores at a point within the exterior boundaries of the latter. The history of the Rarus and Johnstown claims is as follows:

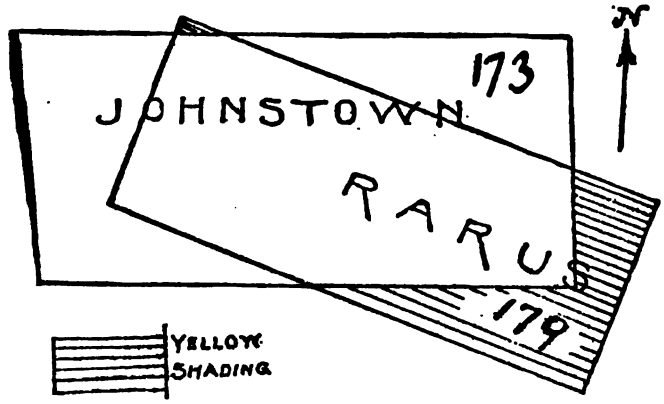
	Rarus.	Johnstown.
Location	Oct. 2, 1878.	Jan. 24, 1879.
Application for official survey	May 26, 1882.	April 17, 1882.
Survey	June 6, 1882.	May 6, 1882.
Application for patent	Feb. 20, 1883.	March 3, 1883.
Approval of survey	May 22, 1883.	Jan. 2, 1883.
Final entry	May 12, 1883.	Sept. 1, 1883.
Patent issued	June 25, 1884.	Nov. 15, 1884.

[1]Patentee is presumptively owner of all within his lines but this presumption is met by proof of apex outside. *Jones* v. *Prospect Mt. Co.* 17 M. R. 530.

Land excluded from a patent survey remains public land—and a discovery may be made on such excepted area. *Adams Lode*, 16 L. D. 233.

The location of the Johnstown overlapped the surface area of the Rarus location, as illustrated by the following diagram, marked "No. 1":

Diagram No. 1.



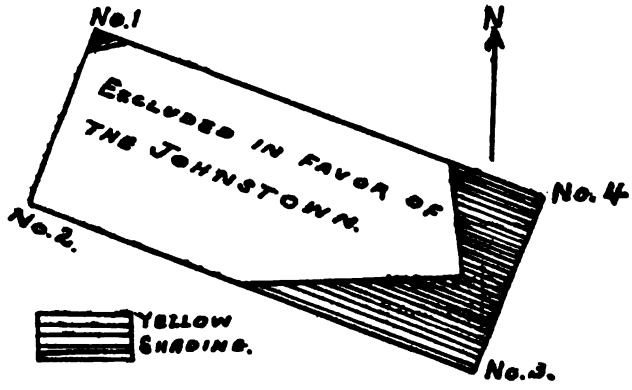
"The Rarus lode, as plaintiff contends, passes through both end lines of the location, * * * has a course from northwest to southeast, and extends on its strike perhaps through both end lines of the Johnstown location."

The survey of the Rarus claim, as approved by the surveyor general, designated for patent lot No. 179. The survey of the Johnstown claim designated for patent lot No. 173. The patent issued for the Rarus, in the description of lot No. 179, recites as the initial corner, and the other corners in running its exterior boundaries, corners marked, respectively, Nos. 1, 2, 3, and 4. These corners, presumably, were coincident with the corners of the original location of the claim. After the description of the exterior boundary line, as aforesaid, is the following language: "containing 2 98-100 acres of land, more or less, and embracing 1,318 linear feet of the said Rarus lode, as represented by the yellow shading in the following plat." In the plat contained in the patent the yellow shading referred to is upon the easterly portion of the claim, and

covers an area of 2.93 acres. There is also a fraction of an acre in the northwesterly corner shaded in yellow.

The following diagram, marked "No. 2," is illustrative:

Diagram No. 2.



The patent in its granting clause reads as follows: "* * * Do give and grant unto the said ———, and to their heirs and assigns, the said mining premises hereinbefore described as lot No. 179, with the exclusive right of possession and enjoyment of all the land included within the exterior lines of said survey not herein expressly excepted from these presents, and of 1,318 linear feet of the said Rarus vein, lode, ledge, or deposit, of the length hereinbefore described, throughout its entire depth, although it may enter the land adjoining: * * * provided, that the right of possession hereby granted to such outside parts of such veins, lodes, ledges, or deposits shall be confined to such portions thereof as lie between two vertical planes drawn downward through the end lines of said survey at the surface, so continued in their own direction that such vertical planes will intersect such exterior parts of said veins, lodes, ledges, or deposits,

excepting, and excluding, however, from these presents, all that portion of the surface ground hereinbefore described which is embraced by said lots Nos. 126, 172, and 173." Lots 126 and 172, last aforesaid, represent portions of mining claims surveyed prior to the Rarus claim, and lot No. 173, aforesaid, is the lot surveyed for the Johnstown patent.

The patent contained the usual provisions and conditions of mining patents, and then this clause of exclusion: "* * * That the grant hereby made is restricted to land hereinbefore described as lot No. 179, with 1,318 linear feet of the Rarus vein, lode, ledge, or deposit for the length aforesaid, throughout its entire depth as aforesaid, together with all other veins, lodes, ledges, or deposits, throughout their entire depth as aforesaid, the tops or apexes of which lie inside the exterior lines of said survey."

The United States receiver's receipt issued to the Rarus patentees reads as follows: "Received from ——— the sum of fifteen dollars, the same being in full for the surface area embraced by survey No. 179; * * * said mineral claim or lot of land * * * being known as the Rarus lode mining claim, embracing 2 93-100 acres, as shown by said survey."

The application for a patent to the Rarus claim designates the land sought to be patented as "an area of 12 97-100 acres, * * * excluding 9 9-100 acres embraced in lots Nos. 126, 172, and 173, not claimed, leaving 2 98-100 acres claimed by the above-named applicants for patent. (That is, the entire area of the survey is claimed, except that portion which is in conflict with the Pennsylvania lode, lot No. 172, and that in conflict with the Johnstown lode, lot No. 173.)"

The Johnstown patent, as conceded by appellant in its brief, "conveys what was called the Johnstown lode, together with the entire surface—so far as the matter affects this controversy—included within the surface boundaries of the location."

The surface area conveyed by the Johnstown patent was 18 acres, for which the United States government was paid $90.

Prior to the issuance of the patents to the Rarus and Johnstown claims on March 7, 1883, the owners of the latter conveyed to the owners of the former a certain portion of the Johnstown which is not involved in the present dispute.

Both appellant and respondent concur in the inference that, in order to avoid a lawsuit by reason of a conflict between the claims, and while steps were being taken to obtain patents therefor, some compromise agreement was entered into between said owners. This is an appeal from an order of the district court of Silver Bow county denying an application for a temporary injunction, and refusing to grant an injunction pending the final determination of the action.

JOHN J. MCHATTON, J. F. VAILE, and ROBT. B. SMITH, for appellant.

JOHN F. FORBIS, for appellee.

BUCK, J. The vein or veins at the point where the ores are in dispute lie about 300 feet from the westerly end-line of the Rarus lode claim, as located, and underneath its located surface.

Appellant contends that, even though the Johnstown owner, under its patent, acquired the surface of the ground in controversy containing said ores, nevertheless the Rarus patent conveyed all the veins whose apexes were within the exterior boundaries of that claim as originally located. It insists that the surface portions of the Rarus conveyed by its patent, namely, the two areas, constituting 2.98 acres, shaded in yellow (see diagram No. 1), cannot be regarded as detached from each other so far as the official survey of the claim or the patent itself is concerned, but must be regarded as connected

by the intervening ground of the claim as originally located, although the surface of such intervening ground was conveyed to the Johnstown patentees.

In other words, it is insisted that lot No. 179, as the official survey of the Rarus was designated for the purpose of patent, coincided as to its exterior boundaries with the Rarus claim as originally located, and that, therefore, the patent to the Rarus conveyed all the veins whose apexes were within the surface of its original location.

In support of its position, it also contends that, in the issuance of patents to lodes, the mining laws of the United States authorize a severance of the minerals from the surface of the ground containing them, when conflicting claims demand it.

While it is true that the surface of mining ground is often spoken of in the decisions of the courts as an incident to the vein whose apex lies within or under it, we are clearly of the opinion that the mining statutes of the United States contain no authority for the conveyance of the lodes or veins embraced in a located quartz claim independently of the surface ground connected with and containing or overlying them. Neither is the subject of patented grant by itself.

Appellant calls to our attention various expressions, occurring in different sections of the United States mineral land statutes, for the purpose of showing that the surface is not regarded as an essential incident of the lode or vein in or below it.

It is no doubt true, that those statutes, taken as a whole, give greater prominence verbally to the lode or vein than to the surface connected therewith; but this naturally results from the fact that the lode is the main subject treated. Such expressions and such prominence, however, cannot avail to permit the grant of lodes or veins embraced in a located quartz claim regardless of the surface connected therewith.

In support of this ruling, we deem it necessary to cite only from a most valuable treatise on mines which has just been published.

In section 780, vol. 2, Lindl. Mines, and sections 58-60, vol. 1, Id., the author most ably discusses the subject of relationship of the surface to the lode, and collates the Federal and state decisions directly pertaining thereto. Want of space alone prevents our giving his language in full.

What did the Rarus patent convey? Let it be conceded that the corners and exterior boundaries of the official survey, lot No. 179, coincide with the corners and exterior boundaries of the claim as located. It does not follow that the patent granted the claim as located. The patent is sufficiently unambiguous to speak for itself. If it were not, however, in the application for a patent to the Rarus claim, lot No. 173, the official survey of the Johnstown claim, surveyed and approved prior to the survey of the former, is expressly excepted. This application asks for a patent to 2.98 acres of area only. See *Golden Reward M. Co.* v. *Buxton M. Co.*, 79 Fed. 868. The patentees of the Rarus paid to the United States $15 only. The patent conveys an area of 2.98 acres and no more. Moreover, it expressly excepts from the grant the Johnstown survey, lot No. 173.

In so far as the patent attempts to convey the Rarus lode on its strike independently of the granted surface of 2.98 acres, is is void and of no effect. The order appealed from is affirmed.

Affirmed.

HUNT, J., concurs.

JAMES WELCH v. JOHN GARRETT.

(51 Pacific 405. Supreme Court of Idaho. Dec. 18, 1897.)

[1]Non-user. A ditch constructed for mining purposes on unoccupied public lands of the United States is held by grant, and the owner of such ditch does not forfeit his right thereto merely by non-user.

Idem. Non-user of a ditch, brought about by circumstances over which the ditch owner has no control, is not evidence of abandonment of, or intention to abandon, such ditch.

(Syllabus by the Court.)

Appeal from District Court, Bingham County; D. W. Standrod, Judge.

Action by James Welch against John Garrett. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Affirmed.

E. E. CHALMERS, for appellant.

F. S. DIETRICH, for respondent.

QUARLES, J. The plaintiff brought this suit to obtain a perpetual injunction to restrain the defendant from inter-

[1]*Hector Co.* v. *Valley View Co.* 28 Colo. 315; 64 Pac. 205.

Non-user of ditch for 14 years excused and held no abandonment. *Wimer* v. *Simmons*, 27 Oreg. 1; 39 Pac. 6.

Six mile ditch in course of construction for four years—held sufficient diligence. *Oviatt* v. *Big Four Co.* 39 Oreg. 118; 65 Pac. 811.

Long cessation of work on a mine to which ditch is appurtenant is an abandonment of the ditch. *Id.*

A ditch is not necessarily an appurtenance to a mine or mill. Contract between ditch and mill-owner construed. *Ginocchio* v. *Amador Co.* 67 Cal. 493; 8 Pac. 29.

Ditch owner can hold against subsequent appropriator only to the maximum of his beneficial use. *Smith* v. *Hawkins*, 120 Cal. 86; 19 M. R. 243.

fering with the use and enjoyment of a certain ditch, known as the "Miners' Ditch," by the plaintiff, and for damages, and a judgment decreeing the plaintiff to be the sole and absolute owner of said ditch. The case was tried by the court without the intervention of a jury, the facts found in favor of plaintiff, and judgment made and entered accordingly. The defendant moved for a new trial which was denied him, whereupon he appealed from the order denying him a new trial, and also from the judgment.

The appellant assigns several errors, the principal one being that the evidence is insufficient to justify the verdict. This contention is based principally upon the ground that the evidence shows an abandonment of that part of said ditch that is situated upon the lands of the defendant. A careful study of the evidence shows, we think, that it established the following facts: The ditch in question was constructed by the predecessors in interest of the plaintiff in 1879, and while the lands of the plaintiff were unoccupied public lands of the United States; that the defendant has since settled upon, entered, and acquired patent, to said lands; that said ditch was constructed at great expense; that in 1887, 1888, and 1889, the plaintiff expended upon said ditch as much as $500; that this ditch conveys water from the Blackfoot river to mining ground owned by the defendant; that from 1889 to 1891, inclusive, the waters of Blackfoot river were involved in litigation, and the court appointed a water master, who shut the water off from the ditch in question, and refused to permit the water to be used by plaintiff during said litigation. In 1893 the plaintiff partly cleaned out the ditch. Plaintiff leased the ditch in 1888, 1889, 1890, 1891, 1892, and 1893, but only portions of the ditch were used by the lessees. In 1894 the defendant, Garrett, obstructed the ditch, and at times during that year interfered with the plaintiff's use of the ditch. The defendant represented his mining claims,

which are unpatented, each year, and exercised, to some extent, ownership each year over the ditch in question. The district court found as a fact that "the plaintiff has never abandoned the said ditch, or any part thereof."

We think that the said finding is supported by the evidence. The non-user of the ditch, or any part thereof, during that portion of the time that its use was prevented by circumstances over which the plaintiff had no control, is not evidence of abandonment of, or intention to abandon, such ditch. The prevention of its use by defendant in any one year did not show any intention on the part of the plaintiff to abandon such ditch. The evidence all tends to rebut the idea of abandonment. We think the findings and the judgment were correct. The plaintiff did not forfeit his right to the ditch in question. The appellant seems to think that the interruption of the use of the ditch by respondent worked a forfeiture, and that the rule of continuous adverse user, upon which the title to an easement may be acquired, applies to this case. This view is not correct. The plaintiff acquired an easement in the lands of the defendant, not by adverse user or by prescription, but by grant. Section 2339, Rev. St. U. S., vested in the predecessors of plaintiff the right of way for the ditch in question when they accepted the offer of donation therein made by the government in said section by constructing the said ditch. Section 2340, Id., which was in force at the time the defendant acquired his said patent, made the patent of defendant subject to plaintiff's right of way for said ditch, and it is immaterial whether the said patent reserved this right to the plaintiff or not. This easement of the plaintiff in the lands of the defendant is by the terms of section 2825, Rev. St. Idaho, real estate.

The plaintiff's title to his ditch right might be barred by limitation, if the defendant or any one else should hold it continuously and adversely to him, openly and notoriously, for

five years, paying all taxes thereon; but no such claim is asserted by the defendant. This view of the case makes it unnecessary to pass on the other questions raised. The trial court properly overruled the defendant's motion for a new trial. The judgment of the district court is affirmed, with costs tc the respondent.

SULLIVAN, C. J., and HUSTON, J., concur.

DIAMOND IRON MINING CO. v. BUCKEYE IRON MINING CO.

(70 Minnesota 500; 73 N. W. 507. Supreme Court. Dec. 20, 1897.)

Facts of the Case. Merchantable iron ore. The plaintiff executed to defendant a lease for a term of years of certain lands for the purpose of exploring for, mining, taking out, and removing the merchantable shipping ore which is or may hereafter be found on, in, or under said lands, the defendant to pay the plaintiff a stipulated sum per ton for all the iron ore mined and removed from the lands during the term of the lease. The lease also contained a covenant by the lessee that he would mine and remove from the lands at least a specified number of tons of ore each year, and that, if he should fail to mine that amount in any one year, he would pay to the plaintiff an amount which, when added to any amount previously paid as royalty for ore mined during that year, should equal the royalty on the minimum quantity of ore which he was required to mine that year; provided, however, that he might mine and remove in any subsequent year, without other payment therefor, a sufficient quantity of ore to offset the amount so paid in excess of the quantity actually mined during such preceding year. The lease further provided that the lessee might terminate the lease at any time on 60 days' notice to the lessor. By diligent and sufficient search and exploration on part of the lessee, it was demonstrated that there was no merchantable shipping iron ore on the land. In an action by the lessor to recover the minimum royalty, *Held*, that "merchantable shipping iron ore" was the subject-matter of the lease, and not mere matter of inducement to its execution.

[1]**No ore no royalty.** Also that the covenant to mine a specified quantity of ore each year, or, upon failure to do so, to pay the royalty upon that amount, imposed an obligation to pay for the stipulated quantity of ore, whether mined or not; not whether it existed or not. In other words, it was not a covenant to pay royalty whether the ore existed or not, but one to pay the royalty if the ore existed,

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[1] *Hewitt Co.* v. *Dessau Co.* 129 Mich. 590; 89 N. W. 365; 22 M. R. — and notes.

Equity will relieve where contract based on mutual mistaken belief as to existence of coal. *Fritzler* v. *Robinson*, 17 M. R. 105.

A mining lease presupposes the existence of merchantable ore. *Blake* v. *Lobb's Estate*, 18 M. R. 462.

Where lessor and lessee contract upon the assumption that merchantable ore exists, which on test proves to be a mutual mistake the contract obligation ceases. *Muhlenberg* v. *Henning*, 15 M. R. 423.

whether mined or not. Hence the non-existence of the ore was a defense to an action to recover the royalty.

Failure to determine lease. The fact that the defendant had not exercised its right to terminate the lease did not prevent it from availing itself of the defense that the royalty had not accrued due. (Syllabus by the Court.)

Appeal from District Court, Hennepin County; Henry C. Belden, Judge.

Action by Diamond Iron Mining Company against the Buckeye Iron Mining Company to recover the minimum royalties stipulated in certain mining leases executed by the plaintiff to the defendant. Judgment was rendered in favor of plaintiff, and defendant appeals. Reversed.

WASHBURN, LEWIS & BAILEY, for appellant.

EDWIN S. SLATER and ROBERT CHRISTENSEN, for respondent.

MITCHELL, J. The evidence in this case more than supports the findings of the trial court. Indeed, there is no substantial conflict in the evidence as to the facts, which were as follows: The plaintiff, being the owner of two 80-acre tracts of land, in April, 1893, executed to the defendant the "mining leases" Exhibits A and B of the complaint, which, so far as here material, are identical in their terms. The land was of no substantial or material value for any purpose unless for mining. Both parties executed these leases on the supposition that the premises contained large quantities of merchantable shipping iron ore, although at that time none had been actually found in the very partial and limited explorations which had been previously made by other parties.

Under these leases the defendant went on and expended $40,000 in erecting suitable and proper machinery, and in

sinking shafts, drifting, crosscutting, exploring, etc., for the purpose of opening up and developing such iron mines or deposits of ore as might be found to exist on the lands. Such exploration and development work demonstrated the fact that no deposits (of any substantial value) of minable, merchantable shipping ore existed on the premises. In consequence of this, the defendant abandoned operations, and never mined any ore except what was raised during the explorations, which has never been removed or shipped, because of its unmerchantable quality. Although the defendant, for the reason given, abandoned operations, it has never removed its buildings and machinery, or surrendered possession of the premises, or given the plaintiff notice of its election to terminate the leases. The plaintiff brought this action to recover the amount of the "rent" or "minimum royalties" for the years ending February 1, 1895, and May 3, 1895, respectively.

The question of the liability of the defendant depends entirely upon the construction of the terms of the leases. Their material provisions are as follows:

The party of the first part [the plaintiff] "does hereby contract, lease and demise unto the party of the second part [the defendant], for the term of twenty-five years, the following described land * * * which said premises are leased to the party of the second part for the purpose of exploring for, mining, taking out, and removing therefrom the merchantable shipping iron ore which is or which may be hereafter found on, in or under said lands," together with the right to construct all buildings, make all excavations, openings, roads, and other improvements, which might be necessary or suitable for carrying on such mining operations, and the right to control the land so as to exclude disorderly persons, and all traffic in intoxicating liquors. It was further provided that the party of the second part should have the right at any time to terminate the leases on giving the party of the first part 60 days' notice of its intention to do so. Also that it should have the right to sub-lease for the purpose of mining ore, with the same rights to the sublessee "as herein granted to the party of the second part." The party of the second part, in consideration of the premises, covenanted and agreed that it would, on or before the 20th days of April, July, October, and January of each year during the term of the leases pay to the party

of the first part for all the iron ore mined and removed from the lands during the three months next preceding at the rate of 25 cents per ton. Also that it would pay all taxes on the lands, the improvements thereon, and the ore products thereof. Also that it would mine and remove from the lands each and every year "during the term and existence of this instrument" at least 10,000 tons of iron ore; it being further understood and agreed that, if it should fail at any time to remove that amount of ore from the lands in any one year, "it should pay to the party of the first part an amount which, when added to any amount previously paid by the party of the second part as royalties for iron ore mined and removed during the current year, shall equal the sum of $2,500, which payment shall be made in payments in proportion and at the times and in the manner hereinbefore specified, it being further understood that the party of the second part may mine or remove a sufficient quantity of ore in any subsequent year, without other payment therefor, to offset the amount so paid at the prices hereinbefore agreed on: provided, in such subsequent year the amount so mined and removed shall be in excess of the 10,000 tons which the party of the second part is obligated under this instrument to take and pay for annually."

In one of the leases the defendant agreed to pay on or before September 1, 1893, in addition to the sums above set forth, a "bonus" of $10,000, which the evidence shows had been paid. It was further covenanted that if the party of the second part should fail to work the mines to the extent of mining and removing at least 10,000 tons per year for three successive years, the party of the first part should have the right, at its option, to cancel and rescind the leases; also that, if any part of the royalty remained unpaid for 60 days after the time specified, it should have the right, at its option, to take possession of the premises. The party of the first part also reserved the right to enter the premises at any time for the purpose of inspecting them, or measuring the ore that had been mined; also the right of way for the construction and operation of one or more railroads across the premises, provided, however, that they should not materially interfere with the mining operations.

We have referred to every provision of the instruments which, in our judgment, would tend to throw any possible

light on the question in this case which is the construction of the provision for the payment of a "minimum royalty."

Mining leases very frequently include, in addition to the covenant to pay for what mineral may be actually mined, a covenant that the lessee shall mine at least a specified amount each year, and, if he fails to do so, he shall pay a sum equal to the royalty on such minimum amount. In such cases the courts have been frequently called upon to construe this covenant, and determine whether it is an absolute undertaking to pay the stipulated amount even if there was no ore to mine, or whether it is merely one to pay for the stipulated quantity, whether mined or not, when the ore exists which might have been mined. These so called leases so vary in their terms that most of the decided cases are capable of being distinguished from each other on their facts. Hence anything like an extended analysis of them would hardly be profitable.

Upon a quite thorough examination of the numerous cases cited by counsel, three facts have impressed themselves upon us, viz.: First, that the courts have frequently made their decisions to turn upon the form of words used in this particular covenant, rather than upon an entire consideration of the various provisions of the instrument, in order to ascertain its scheme and subject-matter; second, that they have often failed to distinguish between the subject-matter of the contract and mere matters of inducement to its execution; and, third, that the courts have been more or less influenced by their familiarity with the doctrines of the common law relating to landlord and tenant, which are usually favorable to the landlord.

Mining leases containing a covenant for the payment of a minimum rent or royalty may be divided into two general classes: First, those which require its payment as a dead rent, irrespective of produce; and, second, those which require the mining of a stipulated amount of ore, or, upon failure to do so, payment of the royalty upon it. Where the covenant is of

the first class, the lessee is liable to pay this minimum royalty as a dead rent, even if no ore existed. Where the covenant is of the second class, it has been generally construed as an obligation to pay for the stipulated quantity of ore, whether mined or not,—not whether it existed or not,—that is, that the lessee contracts for diligence and promptitude in mining, but not for the productiveness of the mine. In our opinion, the covenant in the leases under consideration is of the second class.

Of course, we understand that the mere fact that leased premises prove to be of less value than was supposed is no defense to an action for rent. In other words, the non-existence of things which were mere matters of inducement to the execution of the contract will not relieve a party from its obligations. But the case is entirely different where the thing contracted for, and which constituted the subject-matter of the contract, had no existence.

In the present case, merchantable shipping iron ore, which the parties supposed existed, and not the land, was the subject-matter of these contracts. It is true, they start out in form as leases of the land; but this is only for mining purposes, and every right which the defendant is given in the land is merely incident and auxiliary to mining and taking out merchantable shipping ore. The reddendum clauses all provide for the payment of "royalty" on ore, which is never spoken of as rent for the land. The very covenant which provides for the payment of a minimum royalty also provides for giving the defendant credit on the output of subsequent years for the amount previously paid in excess of the quantity actually mined.

It seems to us that this provision for credit of advance royalties is based on the assumption that there was ore which the defendant might have raised during such prior year or years. Otherwise expressed, this covenant is not one to pay

royalty, whether ore exists or not, but to pay royalty, if ore exists, whether it is mined or not.

Stress is laid on the provision giving the defendant the right to terminate the leases at any time on 60 days' notice as indicating that it was the understanding of parties that this was the only way by which defendant could relieve itself from the payment of the minimum royalty, and that until the leases were thus terminated it was absolutely bound to pay such minimum as a dead rent for the premises. We do not think that any such inference can be fairly drawn from that provision. It had an office to perform entirely independent of the non-existence of ore; as, for example, in case merchantable shipping ore existed, but, because of its low grade, or the great cost of raising it, the defendant deemed it unprofitable to continue mining operations.

We understand this form of mining lease, which is now in common use in this state, was borrowed from Michigan, where it, or one substantially the same, has been in use for many years, and which has received in that state a construction in accordance with our views. *Gribben* v. *Atkinson,* 64 Mich. 651, 31 N. W. 570. The only difference we discover between the lease construed in that case and those now under consideration is that it expressly reserved to the lessor the possession of the lands not occupied by the lessee for mining purposes whenever such possession did not interfere with the lessee's mining operations. But we do not see that this is a material difference, inasmuch as in the present case the land was only leased for mining purposes, especially as the use of the land was of no value for any other purpose.

A lease in most respects similar received a different construction in *Palmer* v. *Walbridge,* 15 Can. Sup. Ct. 650, but the decision was by a divided court. Moreover, in that case the lease was a general lease of the land, and not confined to mining purposes.

The fact that defendant had not formally terminated the lease does not interfere with its right to resist payment of royalty on the ground that it had not accrued due by reason of the non-existence of merchantable shipping ore. Under the findings of fact the defendant was entitled to judgment.

The cause is therefore remanded, with directions to the trial court to amend its conclusions of law and order for judgment in accordance with this opinion.

T. O. HENDERSON ET AL. v. THOMAS FERRELL ET AL.

(183 Pennsylvania 547; 38 Atl. 1018. Supreme Court. Jan. 3, 1898.)

Lessee may delay till last day. A lessee of land for oil and gas purposes, required by his lease to commence operations on the premises within 30 days, on penalty of the lease being void, does not forfeit his rights if on the last day of the period allowed he in good faith enters and commences operations on the premises preparatory to drilling a well, and is prevented by the lessor from proceeding therewith.

[1]**Assignees no greater rights than assignors.** Assignees of one who takes a lease with knowledge of a prior lease, and of the facts on which depends the question of forfeiture thereof have no greater rights against the prior lessee than their assignor.

Appeal from Court of Common Pleas, Washington County.

Ejectment by T. O. Henderson and others against Thomas Ferrell and others. Judgment for plaintiffs. Defendants appeal. Affirmed.

[1]An oral construction of lease between the lessor and lessee, not known to assignee, cannot be availed of by assignee. *Springer* v. *Citizens N. G. Co.* 145 Pa. 430; 22 Atl. 986.

Assignee of lease has a right to same "refusal" allowed to lessee. *Guffey* v. *Clever*, 146 Pa. 548; 23 Atl. 161.

Defendant alleged that he took the oil lease with the express understanding that it was to be assigned to a company about to be formed, to which he had assigned per understanding with plaintiff. *Held* that he was personally liable. *Sanders* v. *Sharp*, 153 Pa. 555; 25 Atl. 624.

Where a lessee assigns he cannot re-enter for breach of condition by any implied covenant to that effect. *Ohio Co.* v. *Auburn Co.* 64 Minn. 404; 67 N. W. 221.

The assignee is not bound for breaches already occurred before he buys in. *Woodland Co.* v. *Crawford*, 55 Oh. St. 161; 44 N. E. 1093.

The assignor continues after assignment liable on the express covenants of the lease. *Heller* v. *Dailey*, 28 Ind. App. 555; 63 N. E. 490.

The assignee of a lease had a defense to action for rent because prevented from getting the coal under a certain provision in the lease. *Held* that this did not prevent action on a separate clause

DAVID STERRETT, R. W. CUMMINS, and CHAS. C. STERRETT, for appellants.

T. F. BIRCH and ANDREW M. LINN, for appellees.

McCOLLUM, J. On the 4th of February, 1896, Albert Behling, being then the owner of the land in suit, leased the same to Alexander Adams, "for the purpose and with the exclusive right of drilling and operating for petroleum and gas." By the terms of the lease, the lessee was required to commence operations on the premises within 30 days from the date thereof, and, on his failure to do so, the lease was to be considered by the parties as "null and void." On the 24th of February, 1896, Adams assigned a half interest in the lease to Henderson. Nothing was done on the premises by the lessees, or by their direction, until the 5th of March, that being the last day of the period allowed by the lease within which to commence operation. On that day, Henderson drove a stake near the center of the lot, to indicate the location of the proposed well, and the point at which the lumber required in the performance of the work called for by the lease should be deposited. In the afternoon of the same day, and while an employe of the lessees was unloading some lumber upon the lot, in accordance with their instructions, he

for cottage rents and that the covenants were independent. *Big Black Co.* v. *Kemmerer*, 162 Pa. 422; 29 Atl. 739.

After sale of the premises; *Held*, that the right of action for prior breaches was in the vendor, not the vendee. *Id.*

Recognition of the assignee by the lessor is no release to the original lessee. *Pittsburg Co.* v. *Greenlee*, 164 Pa. 549; 30 Atl. 489. The liability of the assignee depends upon privity of estate and ceases when that privity ceases to exist. "Each successive assignee is liable for only such breaches of covenant as occur while there is privity of estate between him and the lessor." *Cons. Coal Co.* v. *Peers*, 166 Ill. 361; 46 N. E. 1105.

The assignee of an undivided half interest in a gas lease held for the whole royalty. *Burton* v. *Forest Oil Co.* 204 Pa. 349; 22 M. R. —.

was met by the lessor, who denied that they had any right to put it there. The ground of the denial was that the time allowed for the commencement of operations expired in the forenoon of that day. The lessor was accompanied by a number of persons, who appeared to be in accord with his manifest purpose to prevent the unloading of the lumber upon the lot or the occupancy of it by the lessees or their workmen. The lessor's insistence that the lumber should not be deposited on the lot resulted in the unloading of the balance of it by the roadside, and in his removal from the lot of the lumber unloaded there. It may be stated in this connection that the stake driven by Henderson as above described had been taken up and carried away by the lessor or some member of his family before any lumber was unloaded upon the lot, and that the lessees were not present when the stake or lumber was removed, or when their employe was forbidden to deposit the lumber where they had directed him to.

The lessees had a clear right to enter and commence operations upon the lot on the 5th of March, and if they did so in good faith, and with a purpose to continue the work in accordance with the provisions of the lease, the resistance of the lessor to their occupancy of the lot furnished no warrant for a forfeiture of the lease. This was the view that was taken of the lessor's action by the learned court below, and which the lessor contests on this appeal.

As the entry of the lessees upon the lot was before the time allowed for the commencement of operations under the lease had expired, it was *prima facie,* at least, a lawful entry, and the lessor's action was apparently an unlawful interference with it. It would seem, therefore, that the burden was on him to show conduct on their part which justified his action. But the lessees did not rest their suit for the possession of the lot on a bare presumption. They alleged and introduced evidence to prove that their entry was made in good faith and with a determination on their part to prosecute with due dili-

gence the work they were authorized by the lease to do. The evidence submitted by them showed the obstructions in the way of an earlier commencement of operations, and the efforts they made to secure the materials, machinery, and labor necessary to the proper performance of the work. It also showed that, when they commenced operations on the lot, they intended and were prepared to continue them, and that their failure to do so was caused by the refusal of the lessor to allow them to proceed. It is true that the defendants introduced evidence inconsistent with and tending to discredit the evidence to which we have referred; but this would not have justified a peremptory instruction from the court to the jury to find for the defendants. Certainly the court could not say that the lessees had forfeited their right under the lease to enter and commence operations upon the lot when they did, or that their entry was a mere bluff, and that they did not intend to comply with the provisions of the lease. Whether they commenced operations in good faith, and whether they intended to proceed with due diligence, were questions for the jury, and so was the question whether their failure to continue them was caused by the action of the lessor. These questions were submitted to the jury in a clear and impartial charge, and the result was a verdict based on a finding of facts in accord with the lessees' contention. In other words, it is established by a verdict authorized by the evidence that the lessees entered and commenced operations upon the lot in good faith, and that they were prevented from continuing them by the unlawful interference of their lessor.

The defendants claim under a lease from Behling to Adam A. Welsh, dated March 26, 1896. Welsh saw and examined the Adams lease before he closed his contract with Behling, and, according to the testimony of the latter, was told by him about the occurrences on the 5th of March, and that he would have to be responsible for the lease Adams had. On the 24th of April, Welsh sold and assigned his interest in the

lease of March 26th to Gilmor, who on the same day assigned a half interest in it to the Forest Oil Company. The defendants therefore have, as against the plaintiffs, the rights which Welsh acquired by his lease, and nothing more.

We discover no error in the rulings complained of in the first and second assignments, or in the excerpts from the charge on which the third, fourth, and fifth assignments were based; nor do we think that the defendants have any cause to complain of the answers to their second and fourth points.

We are clearly of the opinion that, upon the facts established by the verdict, the action of ejectment is maintainable.

The assignments are overruled, and the judgment is affirmed.

GEORGE G. STAGE v. SAMUEL P. BOYER ET AL.

(183 Pennsylvania 560; 38 Atl. 1035. Supreme Court. Jan. 3, 1898.)

[1]**Abandonment found contrary to expressed intention.** Where lessee drew the casing from the oil well which he had sunk as his lease provided and removed the machinery and did no further work on the premises for five years it is an abandonment although he kept operating wells in the vicinity on other leases, refused to surrender the lease and expressly stated that he never intended to abandon.

Appeal from Court of Common Pleas, Butler County.

Ejectment by George G. Stage against Samuel P. Boyer and others, commenced in 1895, in which plaintiff claimed under an oil lease made in 1886. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

CLARENCE WALKER, JOHN M. THOMPSON, and W. C. THOMPSON, for appellant.

R. W. CUMMINS and W. D. BRANDON, for appellees.

FELL, J. The plaintiff in this ejectment is the assignee of a lease of a farm for the purpose of drilling and operating for oil and gas. The defendants are lessees of the farm for the same purpose under a lease made 7½ years after the lease under which the plaintiff claims. The single question raised is whether the plaintiff has lost his rights under the lease by abandonment. By the terms of the lease the lessee and his assigns are given the exclusive

[1]The want of intent to abandon will not avail against conduct from which abandonment is a necessary conclusion. *Trevaskis v. Peard*, 18 M. R. 353.

When a lessee neglects to operate where he is bound so to do, it is an abandonment without regard to his intentions. *Parish Fork Co.* v. *Bridgewater Co.* 51 W. Va. 583; 42 S. E. 655.

right to drill and operate for oil for the term of 10 years, and for so long thereafter as oil and gas are found in paying quantities. The lessee is bound to commence operations and to complete a well within one year, and his failure to do so, or to pay a fixed sum for the delay, is ground for forfeiture of all his rights under the lease. The lessee is given the privilege of abandoning the premises at any time, but an abandonment does not deprive him of the right to convey oil and gas over the land from other lands, upon the payment of an annual rental for the privilege. Within a year the plaintiff completed a well, which, after a thorough test, was found to be unproductive. In 1887 he notified the lessor of his intention to abandon the well, assigning as a reason that it was of no value; and he then drew the casing, plugged the hole, and removed all of his machinery and appliances from the premises. He has not since made any search for oil or gas on this farm, but has conducted operations on others in the vicinity, which were leased at the same time, and has drilled 16 wells at an expenditure of nearly $50,000. Four or five years after the plaintiff abandoned his search, he was asked by the lessor to surrender his lease. This request he refused, saying he intended to keep it. He afterwards procured an assignment of his partner's interest in the lease, and recorded the lease and the assignment. He testified at the trial that he had not abandoned the lease, and that he had never intended to do so.

The learned judge, before whom the case was tried without a jury, considering all of the testimony, found as a matter of fact "that the plaintiff, considering the well he drilled as a sufficient test, abandoned further operations under this lease, and abandoned it, because he had failed to find either oil or gas." This finding of fact, if justified by the evidence, fully sustains the judgment entered, and it is unnecessary to consider the other findings of fact or law upon which also it is based.

The leases of the different farms in the locality were entirely independent of each other, and there is no foundation in the testimony for the argument that the search on other farms was made with a view to determine whether there was an oil belt extending under the farm in question, and whether the water in the whole section could be exhausted by pumping. The plaintiff did not so testify, although he was given the fullest opportunity to state what his intentions were at the time. The lease gave him two rights,—one to search for oil and gas, the other to convey oil and gas in pipes from other lands through and over the farm leased. The second right would continue after the abandonment of the first. It was a right for which he was not required to pay until he used it, and which might be of great value to him while operating in the locality. The lease was the written evidence of his right, and an explanation of his refusal to surrender the lease five years after he had given up the search for oil and gas is found in his desire to preserve this right. He had reserved the privilege of abandoning the lease at any time. After a thorough test he gave up the search, abandoned the premises, and never again resumed operation. With these facts clearly established, and unexplained by his testimony or by any course of action which indicated an intention to return and explore for oil or gas, the learned judge was justified in finding that he had exercised his reserved privilege, and abandoned the lease; and on this finding the judgment is affirmed.

ALBERT C. WETTENGEL ET AL. v. JAMES T. GORMLEY ET AL.
ANNA B. WETTENGEL v. JAMES T. GORMLEY ET AL.

(184 Pennsylvania 354; 39 Atl. 57. Supreme Court. January 3, 1898.)

[1]**Where a sole devisee is compelled to divide the royalties from oil wells on his land the distributees must compensate him for surface injuries.** The owner let an oil lease upon 600 acres. He then devised the three farms which made up the 600 acres to his three children severally. The oil wells were upon one only of the three farms.

The Supreme Court held in *Wettengel* v. *Gormley*, 160 Pa. 559, that the royalties were to be divided among the three children. The Court now holds as a corollary to the former case: That the child upon whose land the wells were sunk is entitled to compensation for surface injury or loss of rental value caused by the operation of the wells. The amount of yearly damage fixed by the Court below is upheld but the amount of permanent injury cannot be known before the expiration of the lease and its determination is postponed till after that event.

Appeal from Court of Common Pleas, Allegheny County.

Two actions heard together,—one by Albert C. Wettengel, Guardian of Annie Lockhart and other minors, against James

[1]See S. C. on former appeal, 18 M. R. 93 and notes and compare *Kleppner* v. *Lemon*, 18 M. R. 404; 21 M. R.—, and notes. Also *Harris* v. *Ohio Oil Co.* 19 M. R. 157. These are a series of cases where the courts assume a technical acquaintance with the nature of oil and gas and endeavor to attach certain consequential equities not to our knowledge attempted in any other line of litigation.

Lindley, §862 cites the former appeal in *W.* v. *G.* without comment but does not cite the text case above printed; neither of the appeals are cited in Snyder on Mines. The note to the former appeal *W.* v. *G.* as reported in 40 Am. St. R. 733, merely speaks of the case as novel and interesting.

The Supreme Court of Ohio in *N. W. Natural Gas Co.* v. *Ullery*, (Ohio) 67 N. E. 494, cite the original appeal and the text case; referring to the former they say "it has always failed to meet the approval of our judgment" and of the text case, the second appeal, "It fails to strengthen the original case."

T. Gormley and others; and the other by Anna B. Wettengel against the same defendants. From the decree, plaintiffs appeal. Modified.

J. S. & E. G. FERGUSON, for appellants.

J. McF. CARPENTER, for appellees.

WILLIAMS, J. These cases depend upon the same question. The parties were before us on that question in 1893, and the case is reported in 160 Pa. St. 559, 28 Atl. 934. It is frankly conceded by counsel for defendants that, if the rule laid down in that case is to be adhered to, it rules these. In deference to the decided views of the learned judge of the court below, and the earnest request of counsel, we have listened to what is substantially a reargument of *Wettengel* v. *Gormley,* 160 Pa. St. 559, 28 Atl. 934, and have undertaken to re-examine the reasons on which our decision in that case rests. The facts upon which the controversy arises are in no doubt, but need to be stated, in order that the precise point in question may be seen. In July, 1888, James Gormley was the owner of three contiguous farms, containing, together, nearly 600 acres of land. He made an oil and gas lease of the 600 acres, as a single body, to Tomlinson, for the term of 15 years, reserving a royalty of one-eighth part of the oil produced. This lease gave Tomlinson the exclusive right to bore and operate for oil upon the entire 600 acres during the term of 15 years, and bound him to conduct operations under the lease in such manner as to interfere as little as possible with operations by the lessor and his tenants in the cultivation of the surface. It closed with a stipulation providing that "all conditions between the parties hereto shall extend to their heirs, executors, or assigns." The legal operation of this lease, as between the lessor and the lessee, "their heirs, executors, or assigns," was to sever the leasehold

from the freehold estate. Thereafter the exclusive right of access to the oil-bearing stratum was in the lessee, whose duty it was to develop and operate the leasehold estate for oil and gas. The exclusive right to cultivate the surface, subject to the easement created upon and over it in aid of the operations of the lessee, was in the lessor and his tenants. A sale of the freehold to any person having notice, actual or constructive, of the lease, would have been subject to its provisions, and would in no way have impaired the rights or interest of the lessee. The purchaser would have taken just the estate his vendor was competent to convey, and he would have held it subject to the terms of the lease in every particular. The estates were separate, independent, and in independent hands. The one was personal,—an estate for years. The other was real,—a fee simple. The right to receive or demand the rent was a chose in action, that would fall, under our intestate laws, to the personal representative of a decedent. The heir could not disturb or interfere in any manner with the production of oil or gas, pending the settlement of the estate of the testator, or with the collection of the royalties. But Gormley made a will, by the terms of which he severed the 600 acres into three tracts or farms, and devised one of these to each of his three children. They took the title precisely as the testator held it, subject to all the provisions of the lease. As between themselves, the division of the surface was absolute; but, as to the holder of the leasehold, each took the part devised to him, subject to the common burden, which had been put upon the entire body of the land as a single, undivided tract, containing 600 acres, more or less. As the lease covered all the land, so the rent may be said to issue from each and every part of it. The royalties belonged to the owners of the 600 acres, and not to the owner of any subdivision of it. But, as we have seen, the royalties were personal. They were not disposed of by Gormley's will. They were not even referred to in it. The intestate laws must, in

such case, be looked to for the disposition of this very considerable part of his estate. The children hold, together, all the acreage that is covered by the lease, and each should receive such share of the royalty as his or her share of the land bears to the whole tract covered by the lease. It does not matter in what acre or hundred acres the wells may be situated. The royalties are not payable by the acre, nor by the farm into which the surface may be divided, but upon the total production, wherever, within the 600 acres, the production may take place.

There is no escape from this proposition. The cleaver of the testator, applied by the terms of his will for the division of the lands between his children, made a clean-cut separation of the shares of each down till the leasehold was encountered. There its descent was arrested until the term created by the lease expires. When that occurs, its downward course will be instantly resumed, and the severance of the freehold and its minerals will be complete. The further reflection bestowed upon this question has in no sense shaken our confidence in *Wettengel* v. *Gormley,* 160 Pa. St. 559, 28 Atl. 934. We adhere to it.

There is, however, one new question raised in these cases. It is whether the injury done to any one of these devisees upon whose surface the wells may happen to be, should not be borne, as the benefit is shared, in equal proportions, by the three devisees of James Gormley. The learned judge of the court below so held. He found, as a fact, that the injury done the defendant in the reduction of the rental value of his part of the 600 acres was $200 per annum, and had been for three years prior to his decree; and he found, as a conclusion of law, that this sum of $600 for three years' loss upon rentals should be deducted from the royalties before division. This conclusion we are not disposed to disturb. It is equitable in its operation. But the defendant has his share of the benefit arising from the production of the oil, and

should bear his share of the loss of rental resulting from its production. As to the finding that "it will require time and expense, depending largely upon the number of wells that may have been drilled," to restore the surface to a proper condition after the lease has ended, we see no reason to doubt that the learned judge is correct; and it may be that the sum he fixes upon, viz.: $200 per well, will be required for this purpose, but it is certainly not demandable now. The lease has some years to run. Meantime the defendant will be fully reimbursed for any loss he sustains because of the operations under it by the allowance for loss of rental resulting from such operations. The cost of repairing injuries to the realty can be considered when the time for entering on such repairs approaches.

The decree requiring an account for royalties is affirmed. The calculation should be modified to meet the requirements of this opinion. The $600 loss of rental should be deducted from the three devisees in proportion to their ownership of the surface, and the cost of repairs omitted from the calculation until such time as the approaching termination of the lease makes it possible intelligently to consider the subject.

MONTANA MINING CO., LIMITED, v. ST. LOUIS MINING & MILLING CO. OF MONTANA ET AL.

(20 Montana 394; 51 Pac. 824. Supreme Court. Jan. 17, 1898.)

Proving chain of title. The United States patent and mesne conveyances to plaintiff of a mining lode were admissible in evidence to prove its title thereto, so as to show that plaintiff was entitled, by virtue of such ownership, to the conveyance of the strip of land in controversy, on the ground that in equity it was a part of that lode, although it had been included in the patent to another.

[1]**Agreement to procure patent and convey.** A bond for title to a part of a mining lode, executed before the patent has issued, for the purpose of settling a controversy pending between the owner of that lode and an adjoining owner, is not against public policy.

Evidence relating to the number of obligees in a bond was properly excluded where the bond was in evidence.

Originals not under party's control. A sufficient foundation was laid to authorize the admission in evidence of copies of certain conveyances by showing that the originals were not within the control of the party.

Facts of the case. One of the defendants was the owner of a mining lode adjoining that possessed by plaintiff's predecessors in interest, and in applying for the patent caused a strip of their claim to be included in the survey of his, although plaintiff and its predecessors were and remained in possession. To compromise a lawsuit in regard thereto, such defendant agreed by bond to convey to the plaintiff's predecessors such strip, so soon as the patent was issued. Afterwards such defendant conveyed the claim to the co-defendant, who had knowledge of the agreement, and plaintiff became the owner of the other claim and all rights to the strip in controversy by mesne conveyance from the owners. *Held*, that a finding that plaintiff was the owner and entitled to a conveyance of such strip was proper.

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[1] *Amanda Co.* v. *People's Co.* 28 Colo. 251; 64 Pac. 218.

Time of the essence of the option contract. *Presidio M. Co.* v. *Bullis*, 68 Tex. 581. 4 S. W. 860.

Consideration of the size of the penalty in bond making writ of error a supersedeas where the premises involved were a working mine with ore in sight. *Rose* v. *Richmond Co.* 17 Nev. 70; 27 Pac. 1115.

Parol contemporaneous additional terms cannot be proven where parties have made a written option contract. *Tyson* v. *Neill*, (Ida.) 70 Pac. 790.

Appeal from District Court, Lewis and Clarke County; Horace R. Buck, Judge.

Action by the Montana Mining Company, Limited, against the St. Louis Mining & Milling Company of Montana and another. From a judgment for plaintiff, defendants appeal. Affirmed.

Statement of the case by the Justice delivering the opinion.

This is an action for the specific performance of a contract. The complaint alleges that on the 7th day of March, 1884, the plaintiff's predecessors in interest, namely, William Robinson, John Huggins, Frank P. Sterling, Warren De Camp and John W. Eddy, were the owners of, in possession, and lawfully entitled to the use, occupation, and possession, of a certain portion of the Nine Hour lode mining claim, particularly described in the complaint; that thereafter the defendant, Charles Mayger, applied to the United States land office at Helena for a patent to the St. Louis lode mining claim, owned by the said Mayger, and that in the survey he caused to be made of the said St. Louis lode mining claim he included that part of the Nine Hour lode mining claim described in the complaint, and which is the subject-matter of this litigation; that thereupon the predecessors in interest of plaintiff commenced an action in the district court of the Third judicial district of the then Territory of Montana, to determine the right to the possession of said premises, in which action the said Robinson and Huggins were plaintiffs and the said Mayger was the defendant; that while said suit was so pending in said district court to determine the possession and right to the possession of the mining ground in dispute in this case, and on the 7th day of March, 1884, for the purpose of settling and compromising the said suit, and for the purpose of settling and agreeing upon the boundary lines between the Nine Hour lode mining claim and the St. Louis

lode mining claim, the defendant, Charles Mayger, made, executed, and delivered to the said Robinson, Huggins, and Sterling a certain bond for a deed, whereby, in consideration of the compromise and settlement of the said lawsuit, and the withdrawal of the said protest and adverse claim, and the dismissal of the suit, the said Mayger covenanted and agreed that when he should obtain a patent to the mining ground in dispute in that suit and in this he would make, execute, and deliver to the said Robinson, Huggins, and Sterling a good and sufficient deed for the same; that thereupon Robinson and Huggins dismissed their suit, withdrew their adverse claim, and performed all the conditions of the bond on their part; that the said Mayger then proceeded with his application, and obtained a patent, but that he gave no notice to the plaintiff, or any of its predecessors in interest, of the obtaining of said patent from the government, until some time in November, 1889; that at the time of the execution of said bond for a deed plaintiff's predecessors in interest were in possession of the said premises, and that they and plaintiff have ever since been, and yet are, in possession thereof, holding and using the same as a part of the Nine Hour lode; that by mesne conveyances the title to the said Nine Hour lode, including the portion thereof above particularly mentioned, and in dispute in this suit, has been conveyed to the plaintiff, and that plaintiff is now the owner thereof; that it is entitled to a conveyance of the said premises from the said defendants in accordance with the bond executed by said Mayger to the predecessors in interest of the plaintiff; that said Mayger, on or about the 10th day of June, 1893, pretended to convey the piece of ground in controversy to the defendant, the St. Louis Mining & Milling Company, but that the said company had full knowledge and notice of the making, execution, and delivery of said bond for a deed by the said Mayger, and of the rights and equities of the plaintiff thereunder; that the said St. Louis Mining Company has in-

stituted a number of suits in the circuit court of the United States, in which it claims that it is the owner of the premises described in the complaint, and also claims the right to recover certain sums of money for ores alleged to have been unlawfully extracted from the premises in dispute; that the deed from said Mayger to the St. Louis Mining & Milling Company is a cloud upon plaintiff's title to the premises.

Plaintiff prayed for a decree of court that the defendants execute to it (the plaintiff) a good and sufficient deed to the premises in controversy.

The answer denies all the material allegations of the complaint, and affirmatively alleges that the adverse claim interposed, as stated above, by the predecessors in interest of plaintiff, to the application of Mayger for a patent, was for the purpose of harassing and hindering the said Mayger in obtaining a patent to his mining claim, and that the bond was given contrary to equity, good conscience, and public policy. The replication denies the new matter contained in the answer.

The case was tried to the court without a jury. The court made findings of fact, which are substantially as follows:

(1) The predecessors in interest of plaintiff, named in the complaint, were at the time mentioned in the complaint the owners of, in possession, and entitled to the possession, of the Nine Hour lode mining claim, described in the complaint; and the strip of ground in dispute, called the "compromise ground," was at the time, and thereafter continued to be, a part of the said Nine Hour lode mining claim.

(2) That the bond mentioned in the complaint was executed and delivered by Charles F. Mayger to the parties therein named, by which the said Mayger bound himself to convey to them, or their assigns, the mining ground in dispute, when the said Mayger had obtained a patent therefor; that said bond was given as a compromise and settlement of the controversy as to the land now in dispute, and then in

litigation between the parties, as stated in the complaint; and that said bond was for the purpose of compromising a suit, and fixing and determining the boundary line between the Nine Hour lode mining claim and the St. Louis mining claim, as alleged in the complaint; and that said Mayger thereafter did obtain a patent to the premises in dispute.

(3) That the plaintiffs in said adverse mining suit, upon the execution to them of said bond by said Mayger, dismissed their suit, and performed all conditions of the contract on their part.

(4) That at the time of the execution of said bond the predecessors of plaintiff were in the actual possession of the mining ground in dispute, and that they and this plaintiff have ever since remained in the possession thereof, claiming and holding the same as a part of the Nine Hour lode mining claim.

(5) That at the date of the execution and delivery of the said bond it was expressly agreed between the parties thereto that all of the ground lying to the east of the westerly line of the compromise strip should be a portion of the Nine Hour lode mining claim.

(6) That the plaintiff herein is the successor in interest of the said Robinson, Huggins, and Sterling, the obligees named in said bond, and is also the successor in interest of Warren De Camp and John W. Eddy, who were cotenants with the said obligees in said premises at the date of execution of said bond.

(7) That the mesne conveyances introduced in evidence on the part of plaintiff embrace, and were intended to include, the ground in dispute, and conveyed to the respective grantees therein named all of the interest, legal and equitable, which the grantor or grantors had in said premises at the date of the execution thereof; and that it was the intention of the parties to the deed to convey as well their interest to said

ground in dispute as every other part and parcel of the said Nine Hour lode mining claim.

(8) That in July, 1893, the plaintiff, as the assignee of the said Robinson, Huggins, and Sterling, duly demanded a deed to the ground in dispute from the said defendants, but the said defendants refused to execute such deed, and that no demand was ever made from the said Charles F. Mayger by the plaintiff, or any of its predecessors in interest, prior to July, 1893.

(9) That on the 10th day of June, 1893, the defendant, Charles F. Mayger, assumed to convey the said ground in dispute to his co-defendant, the St. Louis Mining & Milling Company of Montana, but that at the date of said conveyance the said St. Louis Mining & Milling Company had full notice and knowledge of the equities of the plaintiff in and to the said ground, and its possession thereof.

(10) That the defendants wrongfully assert title to the ground in controversy, and thereby cloud the title and estate of the plaintiff therein, and that the plaintiff has a right to have such cloud removed from its title to the ground.

(11) That the court finds all of the issues raised in this case in favor of plaintiff and against the defendants.

As conclusions of law the court found that the plaintiff is entitled to a conveyance from the said defendants for the premises described in said bond and in the complaint herein, known as the "compromise ground"; that the defendants, and each of them, should be enjoined and perpetually restrained from asserting any right, title, or interest of any kind or character in or to the ground in dispute, or any portion thereof, and from in any manner interfering with the possession or enjoyment thereof by plaintiff.

In accordance with said findings of fact and conclusions of law, judgment was rendered for plaintiff, from which judgment, and an order denying a new trial, the defendants appeal.

W. W. DIXON, MCCONNELL, CLAYBERG & GUNN and TOOLE & WALLACE, for appellants.

CULLEN, DAY & CULLEN, for respondent.

PEMBERTON, C. J. There are several assignments of error directed to the action of the court in admitting in evidence the patent to the Nine Hour lode claim, and the mesne conveyances of the predecessors in interest of the plaintiff by which they conveyed their interests in said mining claim to the plaintiff.

These muniments of title are objected to because they do not specifically include as appellants contend, the particular piece of ground in dispute. The patent and conveyances above mentioned all refer to the "Nine Hour Lode Claim" as the description of the premises conveyed. Appellants contend that, as the particular strip of ground in controversy is not included in the Nine Hour lode claim patent, and not expressly included in any of the mesne conveyances above mentioned, but was included in the St. Louis lode mining claim patent, it was error to admit them in evidence.

We think these muniments of title were admissible to prove title to the Nine Hour lode mining claim in the plaintiff. Before the plaintiff could prove that it was entitled to a conveyance of the strip of ground in controversy on the ground that it was in equity a part of the Nine Hour lode claim, it was incumbent on it to prove its ownership of said claim. The patent and mesne conveyances to the Nine Hour lode claim were properly admitted for this purpose.

Counsel for the appellants urge that it was error on the part of the court to admit in evidence the bond for title to the ground in dispute, executed by defendant Mayger to the predecessors in interest of the plaintiff, for the reason that said bond is illegal, because against public policy. This appears to be the principal error assigned in the estimation of

counsel for appellants, and seems to be the chief ground upon which counsel base their objections to the evidence admitted in the case, and upon which they insist that plaintiff is not entitled to recover in this case.

Let us examine this assignment, for upon its determination we think the case practically depends. It is not contended that the Nine Hour and St. Louis lode mining claims were not valid mining claims. They both had valid discoveries, and were located according to law. If so, the owners thereof had title,—a grant to them from the government. *Belk* v. *Meagher,* 104 U. S. 279. It is conceded that Mayger had fully complied with the law, and was entitled to a patent to the St. Louis lode claim, when he applied therefor. Then, to all intents and purposes, the parties to the bond, at the time it was given, were the owners of the mining ground embraced within the claims above named. If so, they could dispose of their title thereto in any way they pleased, unless they were prohibited from so doing by some statute. What did the parties do? In order to settle a costly and troublesome lawsuit, they entered into a compromise, by which they settled the title among themselves to the ground in dispute, and fixed the boundary line between their two claims. We are at an utter loss to see how such a contract can be said to be against public policy or good morals. It seems to us to be just such a compromise of difference between the parties as in encouraged in equity. Our attention has not been called to any statute of the United States that prohibits such contracts, and, unless there is some statutory prohibition, we can conceive of no reason in law or equity why the contract in this case should be held to be illegal. *Gaines* v. *Molen,* 30 Fed. 27.

The court found that the plaintiff was the owner of the Nine Hour lode claim, as well as the assignee of the bond of defendant Mayger for title to the ground in controversy, and that the defendant company took its deed to the same from de-

fendant Mayger with full notice of the equities of the plaintiff. And we think the finding amply supported by the evidence. The evidence also amply supports the finding of the lower court that the predecessors in interest of the plaintiff were in actual possession of the ground in dispute at the date of the bond for title, and that the plaintiff and its predecessors have been in possession ever since that time.

We think there was no error in the action of the court in excluding or striking out the evidence of Mayger that the bond was executed to all the obligees therein named. The bond was in evidence, and spoke for itself in that respect. The court properly found that the title of all the obligees named in the bond to the ground in dispute had been conveyed to the plaintiff.

The appellants assign as error the action of the court in admitting in evidence copies of certain conveyances. We think a sufficient foundation had been laid to authorize the admission of the copies by showing that the originals were not within the control or power of the plaintiff.

We think that the court properly found that the plaintiff was the owner in equity of the ground in controversy, and was entitled to have the legal title conveyed to it by the defendants.

The judgment and order appealed from are affirmed.

Affirmed.

HUNT, J., concurs. PIGGOTT, J., not sitting.

M. A. CISNA ET AL. v. T. H. MALLORY ET AL.

(84 Federal 851. U. S. Circuit Court, District of Washington. January 24, 1898.)

[1] Grub stake contracts like other contracts enforcible in equity must be of definite character, and it must be shown that by their terms and conditions rights have become vested.

[2] An agreement to prospect at expense of the outfitters cannot be enlarged to cover the purchase of claims by the prospector with his own money.

[3] A purchase in the Klondike country was admitted by the defendant in answer to an allegation of a contract with him to prospect for claims in the Methow Mining District, Washington, "and such other places as he might deem desirable." There was two years' interval of time and the purchase was made with his own funds. *Held*, that the complainant had established no case.

Suit in equity by M. A. Cisna, E. E. Lucas, E. D. Rinear, L. C. Waller, A. A. Lewis, S. J. Goodsell, Thomas McCart, and H. C. Thompson against T. H. Mallory and Horatio N. McGuire, to establish the right of complainants to the ownership of undivided interests in certain mining claims on Eldorado creek and Bonanza creek, in that part of Northwest Territory, in the dominion of Canada, known as the "Klondike Region," and for an injunction to restrain the defendant Mallory from disposing of said property. The cause was heard on an application for an injunction pendente lite.

STOLL, STEPHENS, BUNN & MACDONALD, for complainants.

FENTON & O'BRIEN and ALBERT ALLEN, for defendant Mallory.

[1] *Rice* v. *Rigley*, (Ida.) 61 Pac. 290; 20 M. R. —. *Ranahan* v. *Gibbons*, 23 Wash. 255; 62 Pac. 773.

Construction of agreement holding that it applied only to claims already located and therefore not a grub stake contract. *Roberts* v. *Date*, 123 Fed. 228.

HANFORD, District Judge. The object of this suit, as set forth in the amended bill of complaint, appears to be to establish a co-partnership between the plaintiffs and the defendants and joint ownership of certain mining claims in the Klondike region which the defendant Mallory is alleged to have acquired, and to require the said defendant to account for gold dust and nuggets which it is alleged he has taken from said mining claims, and for an injunction to prevent the sale and disposal of said property, and to compel the defendant Mallory to execute conveyances to the plaintiffs of their respective interests. The complainants plead a written contract, and aver that pursuant to said contract they made advances of money to the defendant Mallory, to be used and expended by him in prospecting for, acquiring, and working mining property, and that while said contract was in force, and with the money so advanced, said defendant did go on a prospecting expedition into the Methow and Slate Creek districts, in this state, and went to the Klondike country, and there acquired valuable mining claims, and that he now denies the partnership, and denies that the complainants have, or are entitled to claim, any interest in said mining property. The alleged contract has not been exhibited, and the complainants aver that it has been lost or mislaid, so that they are unable to produce it. In their amended bill of complaint they set forth that, by the terms and provisions of said contract, they (the said complainants) and the defendants became mining partners, and that it was thereby agreed that the defendant Mallory should proceed to that part of the state of Washington called the "Methow Mining District," and to such other places as he might deem advisable, and prospect for, discover, locate, or otherwise acquire, work, develop, and mine, mines, mining claims, water rights, mill sites, and other property, for the use and benefit of the complainants and the defendants, in the proportions hereinafter mentioned; the complainants and the defendant McGuire in consideration thereof fur-

nishing and paying defendant Mallory the sum of $150 in cash, to be used by him in the performance of said agreement, and they agreeing to furnish to him thereafter, from time to time, sufficient money or supplies and materials, not to exceed in value $100 per month, to enable him to in all respects carry out and perform said agreement; the complainants and the defendant McGuire each contributing one-ninth of the said expenses and of any money or supplies or materials, and they each to receive one-twelfth of all mines, mining claims, water rights, mill sites, or other property discovered, located or acquired, with the products, output, rent, or issues thereof, or any part thereof; the defendant Mallory to have and receive the remaining three-twelfths thereof; and that any mines, mining claims, mill sites, water rights, or other property so discovered, located, or acquired by the defendant Mallory, if located or taken in his name, were to be held by him for the use and benefit of the complainants and defendants as aforesaid—and that to that end the defendant Mallory should be the trustee for complainants and the defendant McGuire.

In an affidavit by the complainants Cisna, Rinear, Lewis, and Goodsell, the same contract is set forth, except that the affidavit states that, in addition to the sum of $16.66 contributed by each of the complainants to make up the advance of $150, it was agreed that each should contribute thereafter such further sum as might be necessary to carry out the purposes of the partnership, not exceeding in the aggregate $1,200; that the defendant Mallory agreed to go into the hills and mountains to prospect for, discover, locate, or otherwise acquire, mines, mining claims, water rights, mill sites, and other property, for the use and benefit of said partnership, "the plaintiffs and the defendant McGuire then and there agreeing and authorizing him to purchase mines, mining claims, water rights, mill sites, or other property, for and in the name of the said partnership, for such reasonable sum as in his judgment was prudent and advantageous from a

business standpoint; that said partnership as aforesaid was formed for an indefinite period, and was to continue until dissolved by consent of all parties." The defendant Mallory has answered, denying the equity of the bill,—that is to say, he denies that there ever was any partnership between him and the complainants, and denies that the contract which he entered into with them created a partnership, or contained the terms and provisions alleged by the complainants, and denies that he ever acquired any mining property pursuant to said contract, or with money furnished or contributed by the complainants; and, in an affidavit by said defendant, he states that the only mining property which he has acquired in the Klondike country was so acquired by purchase, with his own individual means, after he had fully exonerated himself from all obligation to the complainants under his contract with them.

It is obvious that if the complainants have any right in mining claims acquired by Mallory, situated in the Klondike country, such rights must be founded upon the contract, or result as a legal consequence from the use and expenditure of the money furnished by complainants, and used in discovering, locating, or otherwise acquiring the property. I consider that the contract cannot be fairly construed so as to create any right in favor of the plaintiffs to property, situated in a distant foreign country, purchased by Mallory, with his own money, more than two years after the agreement was entered into. Some of the complainants, in their affidavits, say that the partnership created by the contract was to continue for an indefinite period, and until dissolved with the consent of all. But the amended bill contains no such averment, and even the affidavit does not assert with certainty and clearness that the contract provides for any such indefinite continuation of the partnership relation. Indeed, the affidavit shows affirmatively that the parties contemplated only an expedition for prospecting and mining, to be completed within a period of time not

exceeding one year; for they say that they agreed to contribute not more than $1,200 in the aggregate, and according to their amended bill, they were to pay not more than $100 per month. I must conclude that the agreement provided for payments not exceeding $100 per month for a period not exceeding 12 months, or else that the affidavit is contradicted by the pleading. There is another apparent discrepancy between the affidavit and the amended bill of complaint. The affidavit states that the defendant Mallory was authorized to purchase mining property for the partnership, but the bill of complaint fails to state that such authority was conferred, either by the alleged contract, or by any separate agreement. I apprehend that if it should transpire that Mallory had purchased mining claims in Klondike on account of the alleged partnership, and agreed to pay therefor prices approximating the supposed value thereof, the complainants would be astonished if called upon to contribute their respective portions of the purchase money; and, if they should meet such a demand with denials of liability, their denials would not be inconsistent with their averments and representations of facts in this case, for even in the affidavit they do not say that they promised to pay for mining property to be purchased by Mallory. The defendant Mallory shows that the only mining property in which he has acquired an interest in the Klondike country was purchased by him with his own means, and there is no showing to the contrary. The complainants show affirmatively that they are ignorant as to the manner in which Mallory acquired the property, and as to all of his transactions in relation thereto. They offer no evidence that any part of the $150 given to Mallory previous to his prospecting trip into the Methow and Slate Creek districts in this state was expended in discovering or acquiring the property which they now claim, or that Mallory acquired or discovered any interest in said property within one year from the date of their contract with him. Grub-stake contracts will be enforced by the courts,

but only as other contracts; that is to say, it is not enough for parties to assert that they have rights, in order to secure legal protection, but they must be able to prove in each case a clear and definite contract, and that by the terms and conditions of such contract, and compliance therewith on their part, rights have become vested. In this case the showing is insufficient, and the application for an injunction must be denied.

GIOVANNI VALCALDA ET AL. v. SILVER PEAK MINES.

(86 Federal 90. Circuit Court of Appeals, Ninth Circuit. February 7, 1898.)

Cancelled receiver's receipt as evidence of good faith. In ejectment to recover a mill-site location connected with a mining claim, to which no patent has issued, where complainant relies upon his own prior possession, and an ouster by defendant, a cancelled receiver's receipt is admissible in evidence, not as showing title, but as tending to show, in connection with other evidence, the good faith of the plaintiff, pursuant to its location and survey. 79 Fed. 886, affirmed.

No recovery on constructive possession. One in possession of public land, not mineral, cannot maintain ejectment against one who has acquired the possession unless the plaintiff show that his own possession was actual not constructive.

Mere assertions of title with an occasional act of dominion are ordinarily not sufficient proof of actual possession.

Sufficient acts of possession to hold mill-site. It is a sufficient possession of a mill-site claim to maintain ejectment therefor that its corners are marked with painted posts, as is the custom in locating such mill sites, and that the claimant had a house and stable thereon, and had constructed tunnels to increase the flow of springs, and built a wagon road to his mines, thus indicating a present and continuous use. 79 Fed. 886, affirmed.

Lapse of time to occupy or use is not of itself proof of abandonment.

In Error from the Circuit Court of the United States for the District of Nevada.

Mill site held to be excluded from town site patent. *Hartman* v. *Smith*, 7 Mont. 19; 14 Pac. 648.

Building cabin used for storing tools and ore house, held sufficient possession for mining or milling purposes under R. S. §2337—the Mill Site Act. *Id.*

In controversies of this character the decision of the land office is not binding on the court. *Id.* (Compare *Goldstein* v. *Behrends*, 123 Fed. 399.)

Bona fide prior holding as a ranch claim will defeat a mill site. *Hamburg Co.* v. *Stephenson*, 17 Nev. 449; 30 Pac. 1088.

Subsequent discovery of mineral will not vitiate a mill site location on what was at the time considered non-mineral land. *Cleary* v. *Skiffich*, 28 Colo. 362; 21 M. R. —.

This was an action of ejectment by the Silver Peak Mines against Giovanni Valcalda and others to recover possession of a mill site located in connection with a mining claim. In the circuit court judgment was given for plaintiff, and the defendants have sued out this writ of error.

ROBERT M. CLARKE, for plaintiffs in error.

M. A. MURPHY, for defendant in error.

Before GILBERT, Ross, and MORROW, Circuit Judges.

GILBERT, Circuit Judge. On the 1st day of October, 1888, the Silver Peak Mines, a corporation, by its attorney in fact, located the Crown mine, and at the same time located five acres of land, not contiguous thereto, as a mill site, under the provisions of section 2337 of the Revised Statutes of the United States, which provides as follows:

"Where non-mineral land not contiguous to the vein or lode is used or occupied by the proprietor of such vein or lode for mining or milling purposes, such non-adjacent surface ground may be embraced and included in an application for a patent for such vein or lode, and the same may be patented therewith, subject to the same preliminary requirements as to survey and notice as are applicable to veins or lodes; but no location hereafter made of such non-adjacent land shall exceed five acres, and payment for the same must be made at the same rate as fixed by this chapter for the superficies of the lode."

In the location notice of the mill site, claim was made to all the waters running from the two springs situated thereon. The notices of the location of the mine and the mill site were posted, the one on the mining claim, and the other on the mill site; and both notices were recorded in the records of the Silver Peak and Red Mountain mining district; and thereafter copies of said notices were recorded in the records of the county recorder for Esmeralda county. During the years

1888 and 1889 work was done and money was expended by the corporation upon its mine, and a tunnel was run on the mill site for the purpose of increasing the supply of water from the said springs; and in the year 1889 a survey both of the mine and the mill site was made for the corporation by a United States deputy mineral surveyor, and posts were numbered and marked and placed at each corner of the mill site by the surveyor. Thereafter work was performed by the corporation in cleaning out the said springs, and increasing the supply of the water. Application was made by the corporation to the government of the United States for a patent; and on February 13, 1890, final proof and payment was made for the land embraced in the Crown lode mine and mill site. Long prior to the date when the mill site was located, the land included in the application had been occupied by the locator's predecessors in interest; and a house, a stockade stable, and a corral had been built upon said premises, and a road had been graded therefrom to the mines of the corporation, at a cost of between ten and fifteen thousand dollars. From the time of its location of said mill site, the corporation had made use of the water of the springs by hauling it in wagons a distance of four or five miles, for use at the mines, for its employes, and for culinary purposes. The only way in which mine owners in that vicinity could obtain water for use in their mines was by hauling it or packing it from springs, and it was the custom of miners in that district to locate springs of water in connection with their mines. In March, 1896, the corporation began an action of ejectment against Giovanni Valcalda and others, the plaintiffs in error, alleging that on March 16, 1896, the defendants had ousted the plaintiff from the premises included in the mill site. The defendants answered, denying the plaintiff's title and right of possession, and denying the plaintiff's right to the spring or the waters thereof, and alleging that the defendant Giovanni Valcalda owned the land upon which the spring rises, and that he had

appropriated the water of the spring for mechanical, stock, and domestic purposes. Upon the issues thus formed, the plaintiff in the action had a verdict and judgment for possession of the premises and the springs of water situated thereon.

Upon the writ of error from this court, it is assigned as error, first, that the court admitted in evidence the duplicate receipt for the purchase money of the Crown mill site, offered by the plaintiff. It is contended that the receipt for the purchase money did not vest the legal title in the plaintiff, and that it was not sufficient to enable it to recover in ejectment. To this it is sufficient to say that the record shows that the receipt was not offered or admitted in evidence for the purpose of proving title in the plaintiff, but was offered and admitted in connection with the other evidence, as tending to show the good faith of the plaintiff in its possession pursuant to its location and its survey, by proving that it subsequently posted notice of its intention to apply for a patent, and paid in good faith the purchase price of the land embraced in the claim. The charge of the court to the jury expressly directs their attention to the purpose for which this evidence was admitted, and for which they might consider it. There was no error in admitting it for that purpose. Neither party claimed that it had acquired the title of the government, nor did either in any way connect itself with that title. The questions at issue were whether the plaintiff had been in the possession of the premises, and whether the defendants had ousted it therefrom. The receiver's receipt was evidence only of possession by the plaintiff, in connection with other evidence thereof, and the jury were not permitted to consider it as evidence of a right of possession.

These considerations are applicable to the next two assignments of error, which are—First, that there was error in admitting in evidence an application of one of the plaintiff's grantors to purchase from the state of Nevada the land in controversy, together with the receipt for the purchase money

and the deed of such grantor to the plaintiff; and, second, that there was error in excluding the defendants' proffered proof that the certificate of purchase and duplicate receipt issued by the land office to the plaintiff for the mill site had been canceled. The papers so admitted showing a conveyance from the plaintiff's predecessor were admitted solely as tending to prove possession. The plaintiff was making no claim of title through its receiver's receipt, and the fact that that instrument had been canceled had no bearing upon the questions in issue. It having been expressly admitted by both parties to the suit that neither party connected itself with the government title, the plaintiff was left to recover, if at all, upon the fact that it had been in the possession of the premises when ousted by the defendants. The action of the officers of the general land office could not affect the real question in issue. Its decision was not a judgment that the plaintiff had no right of possession. It was no more than an adjudication against the validity of the steps which it had taken to procure the title from the United States. It was not decisive of its right to remain in the possession or to take further steps to procure the title if it saw fit to do so.

The real question in controversy in the case concerns certain instructions which were given and refused to the jury. The court charged the jury as follows:

"It is not necessary that the land in controversy, which has been designated as the 'Crown Mill Site,' should be inclosed with a fence, or that it should be reduced to cultivation, to constitute possession. If you believe from the evidence that there was a house, stockade stable, and corral on said land, erected by the plaintiff in this action, or those from whom they derived possession of the premises; that plaintiff, at divers times, improved the springs upon said land, and in 1888 or 1889 made a claim to said land for five acres of land, and the water flowing from said springs on the land, as a mill site and water right; that it caused the land to be surveyed, and posts were erected at each corner of the land, indicating the corners and boundaries thereof, and continued in first possession thereof, until ejected by defendants, if they were ejected, so as to subject the land

to its control, and to notify the public that the land was claimed and occupied, this would constitute a possession of the land."

Upon a careful consideration of the question, we find no error upon the part of the court in so instructing the jury. The property was used by the plaintiff in connection with its mining claim. It had been located as a mill site. It was not located on mineral land, it is true, nor was it contiguous to the mining claim; but it had been located pursuant to the custom of miners in a district in which the mines were generally situated in an arid region, and it was necessary to obtain a supply of water from springs located in the foot hills, generally at considerable distances from the mines. The premises in question were clearly necessary to the proper operation of the plaintiff's mines. They were as much used for mining purposes as if they had been used for a dumping place for tailings or as a site for mill machinery. In *Hartman* v. *Smith,* 7 Mont. 19, 14 Pac. 648, it appeared that a mill site had been located on nonmineral land, not contiguous to the lode, but distant therefrom a distance of two miles and a half. The only improvement made on the land was the erection of a log cabin, in which the shovels, picks, drills, powder, tools, and small quantities of ore from the mining claim were stored. The court held that this use was a use for mining or milling purposes under the statute, and that, having been so used, it was not abandoned or forfeited, notwithstanding the fact that it was put to no other use. The evidence contained in the record now before us does not show that the corporation was not in the actual possession and use of the premises up to the time of the ouster. The bill of exceptions on this branch of the case states only that there was testimony in the case tending to establish the fact that in 1891 the defendants, without obtaining the consent of the plaintiff, finding the cabin on the mill site vacant and unoccupied, and the stable vacant, and no person upon the premises, entered peaceably thereon, made improvements, claimed

and used the water from the spring for domestic purposes, and thereafter remained in such possession and use; but it is not said in the bill of exceptions that there was not evidence contradicting all this testimony, and tending to show that the plaintiff's possession was such as is indicated in the charge to the jury.

That one who is in the actual possession of public land may maintain ejectment against another, who ousts him of that possession, has been well settled by repeated adjudications; but it has never been held that one in the possession of public lands, not mineral lands, who does not connect himself with the title of the government, can maintain ejectment against one who has acquired the possession, unless he shows that his own possession was actual, and not constructive. The mere assertion of title, together with an occasional act of dominion over the premises, or the marking of the boundaries, are ordinarily not sufficient. *Stainінger* v. *Andrews,* 4 Nev. 59.

In *Murphy* v. *Wallingford,* 6 Cal. 648, it was said:

"Possession is presumptive evidence of title, but it must be an actual bona fide occupation, a pedis possessio, a subjection to the will and control, as contra-distinguished from the mere assertion of title and the exercise of casual acts of ownership. A mere entry, without color of title, accompanied by a survey and marking of boundaries, is not sufficient."

In *Coryell* v. *Cain,* 16 Cal. 573, the court said:

"And, with the public lands which are not mineral lands, the title as between citizens of the state, where neither connects himself with the government, is considered as vested in the first possessor, and to proceed from him. This possession must be actual, and not constructive; and the right it confers must be distinguished from the right given by the possessory act of the state. * * * But when reliance is placed, not upon this act, but upon possession of the plaintiff, or of parties through whom he claims, such possession must be shown to have been actual in him or them. By actual possession is meant a subjection to the will and dominion of the claimant, and

is usually evidenced by occupation, by a substantial inclosure, by cultivation, or by appropriate use, according to the particular locality and quality of the property."

Said the supreme court of Nevada in *Robinson* v. *Mining Co.*, 5 Nev. 68:

"Indeed, that the possession, when that alone is relied on, must be actual and complete, is an expression stereotyped in all cases where this question is discussed."

The question, then, arises, what is actual possession as applied to a case such as that now under consideration? It is clear from an examination of the authorities that actual possession may be evidenced in various ways. It is always actual when it is an open and visible occupancy. The occupancy may be evidenced by an inclosure. In such a case it is ordinarily limited to the inclosure, and is not extended to the premises beyond it. It may be evidenced by other improvements, or by actual and visible use. In the case under consideration there was no inclosure, nor was there a personal residence upon the property. In some cases, one or the other of these indications of possession would be held to be essential. But regard must always be had to the nature of the premises and the purpose for which they are occupied. It would seem that a tract of five acres claimed for a mill site, as this was, may, in general, be said to be in the possession of the locator when its corners are marked with painted posts, as is the custom and rule in locating such mill sites, and as required by the regulations of the general land office. In a mining country the presence of the boundary posts is as significant of occupation as an inclosure would be of agricultural lands. In the present case there were, in addition to the boundary posts, the house, the stable, and the springs, together with the tunnels recently constructed to increase the flow of water, and the graded wagon road leading from the mill site to the mines of the plaintiff, all indicating a present

and continuous use. In view of all these evidences of open and visible occupation, we cannot say that the court erred in charging the jury as it did. Nor do we find error in the refusal of the court to instruct the jury, as requested by the defendants, as follows: "When land is located for a mill site or for milling purposes, the party locating and claiming the same must, within a reasonable time, use the land for the purpose for which it was located." There is no requirement in the statute such as is contemplated in this request for instruction, nor have the courts so construed the law. Failure to use a mill site for the purpose for which it is located may, indeed, become evidence of abandonment; but there was no evidence, so far as the record goes, tending to show that the locator had failed or ceased to use the property for the purpose for which it was claimed. The statement in the bill of exceptions that there was evidence tending to show that the defendants had entered upon the premises, finding them vacant, is not inconsistent with such continuous use by the plaintiff. It is not intimated that, notwithstanding this entry upon the premises, the locator intermitted its use of the premises and of the water right, so as to indicate abandonment, or that it ever intended to abandon the mill site. It is well settled that lapse of time does not of itself constitute an abandonment, and that it is only a circumstance for the jury to consider in determining the question whether there has been an abandonment. In other words, the question is one of intent. Said the court in *Waring* v. *Crow,* 11 Cal. 369: "The intention alone governs." *Keane* v. *Cannovan,* 21 Cal. 293; *St. John* v. *Kidd,* 26 Cal. 272. In *Richardson* v. *McNulty,* 24 Cal. 345, it was said: "By the act of occupancy, the plaintiff made it his, and manifested his intention to do so. Once his, it continues his until he manifests his intention to part with it in some manner known to the law." In *Moon* v. *Rollins,* 36 Cal. 337, it was held that one in possession of land might leave it for a period of five years if he had

the intention of returning, and that his mere failure to occupy the land for that period does not necessarily constitute an abandonment.

We find no error for which the judgment of the circuit court should be reversed, and it is therefore affirmed.

MARY ELLA SMITH ET AL. v. PATRICK HAWKINS.

(120 California 86; 52 Pac. 139. Supreme Court. Feb. 12, 1898.)

Final test of appropriation. As against one subsequent in right, an appropriator of water can hold only the maximum quantity which he has devoted to a beneficial use at some time within the period by which his right would otherwise be barred for nonuser.

Department 1. Appeal from Superior Court, Nevada County.

A ditch is an easement on the land over which it runs. *Quinlan* v. *Noble*, 75 Cal. 250; 17 Pac. 69.

The grant of the right to use waste water imposes no obligation on the grantor to use the reservoir so that there shall remain some waste water. *Bryan* v. *Idaho Co.* 73 Cal. 249; 14 Pac. 859. Waste water defined. *Byrne* v. *Crafts*, 73 Cal. 641; 15 Pac. 300.

New ditch constructed to do the duty of old ditch under mortgage, but on different line: *Held*, clear of the mortgage. *Mitchell* v. *Amador Co.* 75 Cal. 464; 17 Pac. 246.

Change of line of ditch about 20 feet during the period, held to break the continuity of possession required to establish title by adverse possession during the legal period. *Fotel* v. *Bonnefoy*, 123 Ill. 653; 5 Am. St. R. 570.

Ditch built across ranch to reach placer, in consideration of allowing rancher to irrigate with it—respective rights of the mine and ranchman considered. *Huston* v. *Bybee*, 17 Oreg. 140; 20 Pac. 51.

Measure of damages for failure to repair ditch. *Orr W. Co.* v. *Reno W. Co.* 19 Nev. 60; 6 Pac. 72.

The act of 1866 granting right of way to ditches includes subsequent easements. *Jacob* v. *Lorenz*, 98 Cal. 332; 33 Pac. 119.

There may be right of way for water without the right to build a dam. *Mesnager* v. *Engelhardt*, 108 Cal. 68; 41 Pac. 20.

A ditch company is not bound to such a degree of diligence as to make it an insurer against accidents. *King* v. *Miles City Co.* 16 Mont. 463; 41 Pac. 431.

As to change of place of use see *Last Chance Co.* v. *Bunker Hill Co.* 17 M. R. 449 and notes.

Non-user is not necessarily proof of abandonment. *Welch* v. *Garrett*, 19 M. R. 193.

Action by Mary Ella Smith and others against Patrick Hawkins to quiet title to a water right. From a judgment for plaintiffs, defendant appeals. Reversed.

C. W. KITTS, for appellant.

R. F. SIMMONS and A. BURROWS, for respondents.

VAN FLEET, J. The cause was here before (*Smith* v. *Hawkins*, 110 Cal. 122, 42 Pac. 453), and the general history of the case will be found more fully stated in the opinion then filed. The judgment was reversed, and, the action having been retried in the court below, judgment again went for plaintiffs, from which, and an order denying a new trial, defendant appeals, contending that the evidence is insufficient to sustain the findings, and that the findings do not support the judgment. It is not necessary to notice the first contention, since we are satisfied that the second must be sustained.

On the former appeal it appeared from the findings that no beneficial use had been made of the water appropriated through plaintiffs' ditch for a period of five years next before the commencement of the action; and it was held that the right of plaintiffs and their grantor to the use of the water being one acquired by appropriation, a failure for that period to devote the water to a useful or beneficial purpose operated, under section 1411 of the Civil Code, to work a forfeiture of plaintiffs' right thereto for non-user as against a subsequent appropriator.

On the last trial the findings, so far as material, are, in substance, that the capacity of plaintiffs' ditch is, and always has been, since its establishment in 1865, 289 miners' inches, measured under a 6-inch pressure, and that plaintiffs are entitled to that quantity of water "for mining or any other useful purposes;" that during the five years next preceding the beginning of this action "the plaintiffs and their grantors

have diverted water from said creek" for a useful purpose. The judgment awards plaintiffs a superior right in the stream to the extent of such 289 inches over that of defendant, a subsequent appropriator, who is found to have been continuously for 13 years last past taking a certain quantity of water therefrom through a ditch owned by him.

Applying the principles announced on the former appeal to these facts, and it is apparent that the judgment is not supported by the findings. The court found that during the period of five years next before the bringing of the action plaintiffs "diverted water" from said creek for a useful purpose; but the quantity of water so diverted and used at any time during said period is not determined, but is left wholly a subject of conjecture. The finding as to the capacity of plaintiffs' ditch, and the right originally acquired thereby to appropriate to the limit of that capacity, is not sufficient as a basis of the judgment. It is neither the capacity of the ditch nor the amount originally appropriated which determines plaintiffs' rights. If plaintiffs could forfeit their entire right of appropriation by non-user, equally will they be held to forfeit less than the whole by like failure; in other words, the necessary result of the principles declared on that appeal is that, no matter how great in extent, the original quantity may have been, an appropriator can hold, as against one subsequent in right, only the maximum quantity of water which he shall have devoted to a beneficial use at some time within the period by which his right would otherwise be barred for non-user. And this principle has been more explicitly declared in the recent case of *Senior* v. *Anderson,* 115 Cal. 496, 47 Pac. 454, where it is held that an appropriation of water by the owner of land by means of a ditch is not measured by the capacity of the ditch through which the appropriation is made, but is limited to such quantity, not exceeding the capacity of the ditch, as the appropriator may put to a useful purpose.

The material fact, then, necessary to sustain the judgment —the maximum quantity of water beneficially employed by plaintiffs at some time within the five years next before the bringing of the action—is lacking.

The judgment and order are reversed.

HARRISON, J. and GAROUTTE, J., concur.

JAMES H. DONOVAN v. JOHN F. CAMPION ET AL.

(85 Federal 71. Circuit Court of Appeals, Eighth Circuit. February 14, 1898.)

Classification of parties. In the federal courts the possible parties to suits in equity are divided into indispensable parties and proper parties.

Proper, or indispensable. Distinction between. Indispensable parties are those who have such an interest in the controversy that a final decree between the parties before the court cannot be made without affecting their interests, or leaving the controversy in such a situation that its final determination may be inconsistent with equity and good conscience; all other parties are proper parties.

Necessary and proper parties. Chancery rule. Under the old chancery rule, parties are divided into necessary and proper parties. All those whose presence is necessary to a determination of the entire controversy are necessary parties, and those who have an interest in the subject-matter of the litigation, which may be conveniently settled therein, but whose presence is not necessary to the determination of the controversy at issue, are proper parties.

Status of agent as party. An agent who was employed to procure the title to real estate, and convey it to his principal, and who has done so, is neither an indispensable nor a necessary party to a bill against his principal to set aside the deed for fraud, and to recover the property and its proceeds.

Agent purporting to act for one, really acting for the other party. No sale from which a substantial advantage has been derived can be sustained when he who actively promoted it acted as the ostensible agent for the vendor, when in reality he was the secret agent of the purchaser.

Appeal from the Circuit Court of the United States for the District of Colorado.

Ore buyers paid the lessee for the ore all except the royalty. The ownership of the leased ground was in dispute. *Held*, that the lessor could not maintain assumpsit against the ore buyer. *Grim* v. *Thomas Iron Co.* 115 Pa. 611; 8 Atl. 595.

Parties in stream pollution case. *Peo.* v. *Gold Run Co.* 66 Cal. 138; 4 Pac. 1152.

Where one holds legal title for self and others, the others need not be made parties. *Rosina* v. *Trowbridge*, 20 Nev. 105; 17 Pac. 751.

This was a bill in equity by James H. Donovan against John F. Campion, A. V. Hunter, and the Ibex Mining Company, to cancel a deed for an interest in a mining claim, and to recover that interest, and for an accounting of the profits of the mine. The complainant appeals from a decree sustaining a demurrer to the bill, and dismissing the suit.

E. B. GREEN and AMOS GREEN, for appellant.

CHARLES J. HUGHES JR. and CHARLES CAVENDER, for appellees.

Before SANBORN and THAYER, Circuit Judges, and PHILLIPS, District Judge.

SANBORN, Circuit Judge. This suit involves one-sixth of the same mine and its products in controversy in the cases of *Kelley* v. *Boettcher*, 85 Fed. 55, and *Curran* v. *Campion*, 85 Fed. 67. It is here upon demurrers to the amended bill, and, with one exception, the questions presented by these de-

Trespass maintained by husband while title stood in his wife's name. *Sunnyside Co.* v. *Reitz*, 14 Ind. App. 478; 39 N. E. 541.

Lessees not necessary in lien suit. *Briscoe* v. *Minah Co.* 82 Fed. 952.

Contract signed by some of the owners, good against those signing. *Stanton* v. *Singleton*, (Cal.) 54 Pac. 587.

An administrator cannot sue for trespass—but if heir assigns right to sue and no defense of misjoinder is made he may recover. *Hook* v. *Garfield Co.* 112 Ia. 210; 21 M. R. —.

Party though acting in different capacities cannot be both plaintiff and defendant in same suit at law; otherwise in equity. *Swearingen* v. *Steers*, 49 W. Va. 312; 38 S. E. 510.

Foreign heir may sue under the negligence act. *Kellyville Co.* v. *Petraytis*, 195 Ill. 215; 63 N. E. 94.

Grantor not an indispensable party in suit to set aside a deed. Full consideration of what are indispensable parties. *Mackay* v. *Gabel*, 117 Fed. 873.

murrers are very similar to those considered and decided in those cases. The suit was brought by the appellant, James H. Donovan, to secure the cancellation of a deed which he made on April 27, 1893, to one Joseph L. Budd, of one-sixth of the Little Johnny lode mining claim, for the recovery of that one-sixth interest, and for an accounting and recovery of one-sixth of the products of the mine. He filed his original bill on September 16, 1895. A demurrer was interposed to it, and sustained. The bill was amended on July 7, 1896; demurrers to the amended bill were sustained; and the suit was dismissed. The appeal challenges the decree of dismissal.

The ground of the demurrers to the bill which was not presented in the cases of *Kelley* v. *Boettcher* and *Curran* v. *Campion* is that Joseph L. Budd, the grantee in the deed which is attacked, has not been made a party to this suit. The amended bill, however, alleges that Budd is a resident of the state of Ohio; that he was a mere agent or tool of the appellees John F. Campion, A. V. Hunter, and the Ibex Mining Company for the purpose of obtaining the title to the interest of the appellant in their behalf; that the consideration for the deed was paid by the Ibex Mining Company, and not by Budd; that Budd has conveyed the interest he has obtained by the deed to the Ibex Mining Company; and that he has not, and never had, any actual interest in the property. The limitation of the jurisdiction of the Federal courts by the citizenship of the parties, and the inability of those courts to bring in many parties beyond their jurisdiction by publication, has resulted in a practical division of the possible parties to suits in equity in those courts into indispensable parties and proper parties. An indispensable party is one who has such an interest in the controversy or the subject-matter of the controversy that a final decree between the parties before the court cannot be made without affecting his interests, or leaving the controversy in such a situation that its final determination may be inconsistent with equity and good conscience.

Every other party who has any interest in the controversy or the subject-matter which is separable from the interest of the parties before the court, so that it will not be immediately affected by a decree which does complete justice between them, is a proper party. Every indispensable party must be brought into court, or the suit will be dismissed. The complainant may join every proper party, and he must join every proper party who would have been a necessary party under the old chancery rule, unless his joinder would oust the jurisdiction of the court as to the parties before it, or unless he is incapable of being made a party by reason of his absence from the jurisdiction of the court or otherwise. The old chancery rule is that all those whose presence is necessary to a determination of the entire controversy must be, and all those who have an interest in the subject-matter of the litigation which may be conveniently settled therein may be, made parties to the suit. The former are termed the "necessary" and the latter the "proper" parties. *Sioux City Terminal R. Co.* v. *Trust Co. of N. A.,* 49 U. S. App. 523, 530, 27 C. C. A. 73, 82 Fed. 124, 126; Rev. St. §§ 737, 738; Equity Rule 47; *Chadbourne* v. *Coe,* 10 U. S. App. 78, 83, 2 C. C. A. 327 and 51 Fed. 479, 481; *Shields* v. *Barrow,* 17 How. 130, 139; *Ribon* v. *Railroad Co.,* 16 Wall. 446, 450; *Coiron* v. *Millaudon,* 19 How. 113; *Williams* v. *Bankhead,* 19 Wall. 563; *Kendig* v. *Dean,* 97 U. S. 423; *Alexander* v. *Horner,* 1 McCrary, 634, Fed. Cas. No. 169; *Cole Silver M. Co.* v. *Virginia Co.,* 1 Sawy. 685, Fed Cas. No. 2,990. Tested by these rules, Budd was neither a necessary party, under the chancery rule, nor an indispensable party, under the rule of the Federal courts. He had no interest in the subject-matter of the controversy, and no interest in the controversy. He was a mere conduit through which the title of Donovan passed to the mining company, and the entire controversy can be finally determined consistently with equity and good conscience between the real parties in interest who are now before the

court. The demurrer to the amended bill cannot be sustained on account of the absence of Budd.

The other grounds of the demurrers in this case are the same that were urged against the amended bills in the two cases against these appellees to which we have referred. The amended bill in this case does not present the same facts and circumstances pleaded in those cases. It presents a case in which an attorney-at-law, who was already retained and employed by the appellees to purchase for them outstanding interests in this mine, and who knew that it had already produced $2,000,000 above the expenses of its operation, and knew that it was considered worth many millions of dollars, permitted himself to be retained and consulted as his attorney by the appellant, who was ignorant of the history, condition, and value of this mine, and undertook to, and did, as his attorney-at-law, advise him relative to the condition and value of the mine and the best disposition of his interest, told him that no net products had ever been realized from the operation of the mine up to that time, and that it was of little or no value, advised him to sell his interest to Joseph L. Budd for the sum of $2,500, and by these representations and this advice induced him to convey it for that sum, without ever informing him that he was the attorney and agent of the real purchasers, the appellees, to buy this property for them and that he was purchasing, through Budd, for these clients. This bill shows that, at the very time that this deed was obtained and that this attorney made these statements, the mine was producing ore of the value of from $300,000 to $500,000 per month, and that the appellant did not learn of its history, condition, or value at this time until about two weeks before he filed his original bill. It can hardly be successfully maintained that these facts, if established, would not entitle the appellant to a cancellation of his deed. They seem to be ample for that purpose, regardless of the fiduciary relation in which the attorney of the appellees acted to induce the sale; and it

is too well settled to admit of discussion that no sale where any substantial advantage has been taken can be sustained when he who actively promoted it acted as the ostensible agent for the vendor, when he was in reality the secret agent of the purchaser. It inaugurates so dangerous a conflict between duty and self-interest to allow the agent of a vendor to become interested as the purchaser, or the agent of a purchaser, in the subject-matter of his agency, that the law wisely and peremptorily prohibits it. *McKinley* v. *Williams,* 36 U. S. App. 749, 752, 20 C. C. A. 312, 313, and 74 Fed. 94, 95, and cases there cited. The bill in this case is of the same general character, has the same defects, and is subject to the same general objections, as that in *Curran* v. *Campion.* While it does not plead the same facts and circumstances, it does present a state of facts the general character and legal effect of which are not so radically different from those portrayed in that bill as to admit of a conclusion different from that at which we arrived in that case. An extended recital of its allegations would be futile. All the questions presented by the demurrers to it which have not already been discussed have been considered and determined in that part of the opinion in *Kelley* v. *Boettcher* which treats of the demurrer to the amended bill in that case, and, upon the authority of that decision, the decree below is reversed, and the case remanded to the circuit court, with directions to permit the appellees to answer the bill.

GILLIS v. DOWNEY.

(85 Federal 483. Circuit Court of Appeals, Eighth Circuit. February 28, 1898.)

[1]**The possessory title** of the locator of a mining claim or his grantee is sufficient ownership upon which to base a bill to quiet title, regardless of the outstanding fee in the United States.

Locator's title indefinitely good. So long as the locator of mining lands complies with the statutory requirements and performs $100 worth of work in each year, he is entitled against all the world, subject to the paramount sovereignty of the United States, to hold and enjoy his possession, even though he never apply for nor take out a patent.

Federal case on state statute.. Where the requisite diverse citizenship exists, a suit may be brought on the chancery side of the federal court in a given state by a person in actual possession of real estate therein to quiet his title as against an adverse claimant, predicating the suit upon the state statute extending to such cases the jurisdiction of the state courts.

[2]**Adverse location pending neglected patent application.** The fact that the 60 days prescribed in Rev. St. § 2325, for publication of notice of an application for a patent has expired before the application is adversed, does not preclude a contest of the applicant's right to a

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[1]Discussion of the nature of possessory mining titles. *Black* v. *Elkhorn Co.* 18 M. R. 375.

As to when bill to quiet title lies and upon what pleadings and evidence supported see *Ramus* v. *Humphreys*, (Cal.) 65 Pac. 875; 21 M. R. —. *Crown Pt. Co.* v. *Crismon*, 39 Oreg. 364; 21 M. R. —, and notes.

A mining claim is real estate, is a freehold and descends to the heir. *Harris* v. *Equator Co.* 12 M. R. 178. *Merritt* v. *Judd*, 6 M. R. 62. *McFeters* v. *Pierson*, 15 Colo. 201; 24 Pac. 1076. *Roseville Co.* v. *Iowa Gulch Co.* 16 M. R. 93.

Bill to quiet title against a single adverse claimant must aver that complainant's title has been successfully tried at law at least once. *Boston Co.* v. *Montana Co.* 188 U. S. 632.

Possession of the apex is sufficient to sustain bill in equity to quiet title under ground and ejectment is not an adequate remedy. *Empire Co.* v. *Bunker Hill Co.* 121 Fed. 973.

A party in possession of a valid mining claim in Alaska has the right to maintain the action. *Fulkerson* v. *Chisna Co.* 122 F. 782.

[2]*South End Co.* v. *Tinney*, 22 Nev. 19; 35 Pac. 89.

patent, where the adverse claim does not arise until after the expiration of the 60 days, and where the applicant has let his application lie dormant for years without either paying the purchase money or doing the required $100 worth of work each year.

Dormant proceeding in land office. Annual labor not done. The filing of an application for a patent does not suspend the obligation to keep up the required annual work where, without paying the purchase money, the claimant permits his application to sleep for years; and upon such failure to comply with the conditions the claim is open to relocation in the same manner as if no location had ever been made.

Appeal from the Circuit Court of the United States for the District of Wyoming.

NELLIS E. CORTHELL, for appellant.

STEPHEN W. DOWNEY, for appellee.

Before SANBORN and THAYER, Circuit Judges, and PHILIPS, District Judge.

PHILIPS, District Judge. The appellant (complainant below) instituted suit in the United States circuit court for the district of Wyoming to quiet the title and determine the right of possession to certain lands containing placer mines. The complainant is a citizen of Illinois, and the defendant a citizen of Wyoming. The complainant at the institution of the suit was in the actual possession of the real estate. The bill, in substance, recites that the lands in question are mineral lands, and were located as such in 1896 by the grantors of the complainant, and that the locations were made under and conformably to the acts of congress relating to the acquisition by location of such lands; that the grantors of complainant, and the complainant since he acquired by deeds of conveyance the rights and interest of said locators, have complied with all the requirements of the statute and local rules of miners in said state relating to discovery, location, mark-

ing, recording, working, and possession of placer mining claims. The bill alleges that the defendant is asserting an estate and interest in said lands under a precedent location, made by him, under the mining laws, and his grantors, in 1890, and that in 1891 the defendant filed his application in the land office for a patent to said lands. The bill then alleges that the claim of the defendant is ineffectual, because it includes nonmineral lands; because the defendant had not discovered mineral deposits, and failed to mark his locations upon the ground, as also to perform the annual work required by the statute in each of the years from 1891 to 1896, and failed to comply with the laws and local regulations respecting possessory titles to such lands, with the further averment that about January 1, 1892, the defendant abandoned his claim and any right to the possession of the lands. The bill further avers that on February 3, 1897, the complainant filed in the proper land office his protest and notice of adverse claim to the application for patent, which protest was pending therein at the time of the institution of this suit; that the purchase price for said land has not been paid nor tendered, and no patent had issued therefor. The prayer of the bill is that the defendant be required to set out his claim, that he be enjoined from asserting any adverse claim against complainant, that the complainant's title be quieted and established, and that he be adjudged entitled to the possession and peaceable enjoyment of the lands. To this bill the defendant appeared and filed a double plea in the nature of a demurrer and plea to the jurisdiction, raising the question that the matters complained of are not cognizable in a court of equity; that the bill does not contain any equity entitling the complainant to relief; and, further, that it appears from the bill that the matter in controversy between the complainant and the defendant is pending in the land office department, which has full jurisdiction over the subject-matter, and precludes the jurisdiction of the United States court. The circuit court

sustained the demurrer and the plea, and dismissed the bill. To reverse this decree the complainant prosecutes this appeal.

We are not advised by the record on what particular ground the court below based its decision. The chief reliance of counsel for defendant for upholding the decree is that the mere possessory title to the land, as disclosed by the bill, is not sufficient to support a suit to quiet the title. The case of *Frost* v. *Spitley*, 121 U. S. 552, 7 Sup. Ct. 1129, is mainly relied upon to support this contention, in which it was, in effect, held that a bill in equity to quiet title cannot be sustained, either under general equity jurisprudence or under the statute of Nebraska, by one having an equitable title only. In that case the interest of the complainant was obtained under an execution, which was a mere equitable interest, the legal title being outstanding, and the purchase money not having been paid. All the purchaser acquired under the execution sale was the interest of the defendant in execution, and a right to the legal title on payment of the money. It was of such condition that the court said that:

"Under the jurisdiction and practice in equity, independently of statute, the object of the bill to remove a cloud upon the title and to quiet the possession of real estate is to protect the owner of the legal title from being disturbed in his possession, or harassed by suits in regard to that title; and the bill cannot be maintained without clear proof of both possession and the legal title. * * * A person out of possession cannot maintain such a bill, whether his title is legal or equitable, for, if his title is legal, his remedy at law by action in ejectment is plain, adequate, and complete, and, if his title is equitable, he must acquire the legal title, and then bring ejectment."

But the court further observed:

"It is possible that one who holds land under a grant from the United States, who has done everything in his power to entitle him to a patent (which he cannot compel the United States to issue to him), and is deemed the legal owner so far as to render the land taxable to him by the state in which it lies, may be considered as having sufficient title to sustain a bill in equity to quiet his right and possession."

The statute of Nebraska then in force authorized an action to be brought "by any person or persons, whether in the actual possession or not, claiming title to real estate against any person or persons who claim an adverse estate or interest therein, for the purpose of determining such estate or interest and quieting the title to said real estate." Gen. St. Neb. 1873, p. 882. The court held that the term "the title," as used in this statute, meant the legal title. Therefore the complainant must assert by his suit something more than that he is in possession, or that he has the title to the premises. He must claim, and, of consequence, prove, "title to the real estate."

As applied to ordinary claims to real estate in non-mining states or territories like the state of Nebraska, the rule is general that to entitle the claimant to maintain an action to quiet title he must be the owner of the title to the land. But in respect to claims to mining lands in our Western states and territories, beginning with the discoveries of the precious metals in California in 1848, followed up with subsequent explorations and discoveries, a system of mining customs, usages, and rights has developed, taking the form and sanction of prescriptive laws of universal recognition, which national and state legislatures later crystallized into written statutes. Mr. Justice Field, by reason of his early and long connection with the origin and growth of this unwritten law of the Pacific slope, both on the state and federal bench, has been recognized as high authority touching this branch of American jurisprudence. In *Jennison* v. *Kirk,* 98 U. S. 453, speaking of the necessity of rules and customs constituting the very foundation of proprietary rights in mining property, he said that:

"A series of wise judicial decisions had molded these regulations and customs into a comprehensive system of common law, embracing not only mining law, properly speaking, but also regulating the use of water for mining purposes. The miner's law was part of the miner's nature. He had made it, and he trusted it and obeyed it.

He had given the honest toil of his life to the discovery of wealth, which, when found, was protected by no higher law than that enacted by himself under the implied sanction of a just and generous government."

Again, this learned judge said:

"In every district which they occupied they framed certain rules for their government, by which the extent of ground they could severally hold for mining was designated, their possessory right to such ground secured and enforced, and contests between them either avoided or determined. These rules bore a marked similarity, varying in the several districts only according to the extent and character of the mines; distinct provisions being made for different kinds of mining, such as placer mining, quartz mining, and mining in drifts or tunnels. They all recognized discovery, followed by appropriation, as the foundation of the possessor's title, and development by working as the condition of its retention. And they were so framed as to secure to all comers, within practicable limits, absolute equality of right and privilege in working the mines. Nothing but such equality would have been tolerated by the miners, who were emphatically the lawmakers, as respects mining upon the public lands in the state. The first appropriator was everywhere held to have, within certain well-defined limits, a better right than others to the claims taken up; and in all controversies except as against the government he was regarded as the original owner, from whom title was to be traced."

It was, therefore, the intent and object of the federal statute in question in this case "to give the sanction of the United States to possessory rights which had previously rested upon local customs, laws, and decisions of the courts, and to prevent such rights from being lost on sale of the land." To emphasize not only the dignity of possessory rights acquired by mining locators, but to establish their status in the courts, and protect such rights, congress, in 1865, enacted that:

"No possessory action between persons in any court of the United States for the recovery of any mining title or for damages to any such title, shall be affected by the fact that the paramount title to the land in which such mines lie is in the United States; but each case shall be adjudged by the law of possession." 13 Stat. 441, c. 64, § 9; Rev. St. 1878, § 910.

By "mining title," as employed in this statute, evidently is meant the title which the miner obtains by his discovery and location, followed up by a compliance with the statutory regulations to preserve his right of possession; and therefore, in a possessory action between persons, notwithstanding the paramount title to the land is in the United States, "the case shall be adjudged by the law of possession" as between the parties. Hence it is declared in section 2322, Rev. St. 1878, that:

"The locators of all mining locations heretofore made, or which shall hereafter be made, on any mineral vein, lode or ledge, situate on the public domain, their heirs and assigns * * * so long as they comply with the laws of the United States governing their possessory title, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their location, and of all veins, lodes and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side-lines of such surface locations."

Section 2324 authorizes the miners in mining districts to make their own regulations, not in conflict with the laws of the United States or those of the state or territory, in respect to the location, manner of recording, and amount of work necessary to hold possession, with the exception that the statute requires that the location shall be distinctly marked on the ground, and direction as to the recording of the mining claim, with the additional requirement that until the patent has been issued not less than $100 worth of work shall be performed or improvements made during each year. It is recognized law that, so long as the locator complies with the statutory requirements, and performs the $100 worth of work in each year, he is entitled against all the world, subject to the paramount sovereignty of the United States, to hold and enjoy his possession. He may never apply for nor take out a patent, yet, so

long as he does the acts required by said section 2324, he may hold and enjoy perpetually his claim.

Mr. Justice Fuller, in *Manuel* v. *Wulff*, 152 U. S. 510, 14 Sup. Ct. 653, in summarizing the rights acquired by the locator under section 2322, said:

"When such qualified persons have made a discovery of mineral lands, and complied with the law, they shall have the exclusive right to possession and enjoyment of the same. It has, therefore, been repeatedly held that mining claims are property in the fullest sense of the word, and may be sold, transferred, mortgaged, and inherited without infringing the title of the United States; and when a location is perfected it has the effect of a grant by the United States of the right of present and exclusive possession." *Forbes* v. *Gracey*, 94 U. S. 762; *Belk* v. *Meagher*, 104 U. S. 279; *Gwillim* v. *Donnellan*, 115 U. S. 45, 5 Sup. Ct. 1110; *Noyes* v. *Mantle*, 127 U. S. 348, 8 Sup. Ct. 1132.

The statute (section 2326) expressly recognizes the possessory right to be the subject of litigation between competing claimants, subject to the usual jurisdiction of courts over real actions. It expressly provides that whenever the claim of any locator is adversed, the proceeding before the land office department "shall be stayed until the controversy shall have been settled or decided by a court of competent jurisdiction, or the adverse claim waived." Neither party to the contest is required to have fully paid the purchase money. This payment is made as a condition precedent to the issue of the patent. In *Perego* v. *Dodge*, 163 U. S. 160-165, 16 Sup. Ct. 973, the court, speaking of the statute in question said:

"Thus the determination of the right of possession as between the parties is referred to a court of competent jurisdiction in aid of the land office, but the form of action is not provided for by statute, and apparently an action at law or suit in equity would lie, as either might be appropriate under the particular circumstances,—an action to recover possession when plaintiff is out of possession, and a suit to quiet title when he is in possession."

On account of the character of the locator's title without having paid the final purchase money, or having obtained a

patent, the courts recognize the importance, after congress has held out to the locator inducement to go upon and into the mineral lands to bring out the precious ores, to increase the nation's wealth, of extending to him every weapon in the armory of justice, offensive and defensive, to protect his right of enjoyment, and give him the sense of security while prosecuting his work. How can he work successfully if he be perpetually disturbed by the pretensions of adverse claimants? He dare not incur great outlay of money for necessary machinery and labor for development, if uncertain, when he has reached compensating mineral, whether his expenditures and labor are to be enjoyed by an antagonist. Why should he not, therefore, have the most plenary and summary remedies for quieting his claim, which courts of equity are so peculiarly adapted to furnish? It was in response to this demand of justice that Mr. Justice Field, in *Dahl* v. *Raunheim,* 132 U. S. 262, 10 Sup. Ct. 75, said:

"It does not appear in the present case that a patent of the United States had been issued to plaintiff, but it appears that he has complied with all the proceedings essential for the issue of such a patent. He is, therefore, the equitable owner of the mine, and the government holds the premises in trust for him, to be delivered upon the payment specified. We accordingly treat him, so far as the questions involved in this case are concerned, as though the patent had been delivered to him. Being entitled to it, he has the right to ask a determination of any claim asserted against his possession which may throw doubt upon his title."

And we doubt not that it was the purpose, among other things, of the legislature of the state of Wyoming to emphasize this policy in enacting the following statute prior to the origin of this contention:

"An action may be brought by any person in possession, by himself or tenant, of any real estate against any person who claims an estate or interest therein adverse to him, for the purpose of determining such adverse estate or interest." Rev. St. Wyo. § 2985.

Under this statute the supreme court of the state has held that a petition is sufficient which contains a general allegation that the petitioner is in the actual possession of the described premises, and that the defendant claims an estate or interest therein adverse to him. *Durell* v. *Abbott*, 44 Pac. 647. This action, therefore, could have been brought in the state court on a petition containing such allegations as the above case. And, where the requisite diverse citizenship exists, the action may be brought in the United States court, predicated on the local statute. *Gaines* v. *Fuentes*, 92 U. S. 10; *Dennick* v. *Railroad Co.*, 103 U. S. 11; *Flash* v. *Conn*, 109 U. S. 371, 3 Sup. Ct. 263; *Chicot Co.* v. *Sherwood*, 148 U. S. 529, 13 Sup. Ct. 695; *Cowley* v. *Railroad Co.*, 159 U. S. 569, 16 Sup. Ct. 127. This is equally true in suits to quiet title. *Holland* v. *Challen*, 110 U. S. 15, 3 Sup. Ct. 495; *Greeley* v. *Lowe*, 155 U. S. 75, 15 Sup. Ct. 24; *Harding* v. *Guice*, 25 C. C. A. 352, 80 Fed. 162; *Perego* v. *Dodge*, 163 U. S. 165, 16 Sup. Ct. 971. As a suit to quiet title pertains to the inherent jurisdiction of courts of equity, it was competent for complainant to bring his action on the chancery side of the court. The statutory form of procedure is in aid and not exclusive of the right to proceed in equity.

The bill sets out all the facts which show compliance by the complainant with the prerequisites of the federal statute investing him with the right of possession to the land in controversy, and entitling him to enjoy that right undisturbed, and to have his title to the possession quieted against the pretended adverse claim of the defendant. But it is insisted by defendant that, as he had made application to the land office department for a patent, pursuant to the provisions of section 2325, Rev. St., and the 60 days prescribed therein for publication of notice of such application had expired before the complainant adversed the application, the complainant is precluded from contesting his right to a patent. It does not appear from the averments of the bill that the 60-days notice was ever pub-

lished, as required by the statute. But, assume that it was, this fact has no application to the instance where the adverse claim does not arise until after the expiration of the 60-days limitation, and the applicant for the patent has let his application lie dormant for a number of years without either paying the purchase money or doing the required work of $100 each year pending the application for patent. *Enterprise M. Co.* v. *Rico-Aspen M. Co.*, 32 U. S. App. 75, 13 C. C. A. 390, and 66 Fed. 200, affirmed in 167 U. S. 108, 17 Sup. Ct. 762. The filing of the application for a patent does not suspend the obligation to keep up the required work where, without paying the purchase money, the claimant permits his application to sleep for years, as in this case. And "upon such failure to comply with these conditions the claim or mine upon which the failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made." *Black* v. *Mining Co.*, 163 U. S. 450, 16 Sup. Ct. 1101.

The decree of the circuit court dismissing the bill is reversed, at the defendant's cost, and the cause is remanded, with directions to vacate the decree, with leave to the defendant to make answer to the bill within such time as the circuit court may direct, and for further proceedings in conformity with this opinion.

BELLEVILLE STONE CO. OF NEW JERSEY v. HENRY MOONEY.

(61 New Jersey L. 253; 39 Atl. 764. Court of Errors and Appeals. Feb. 28, 1898.)

[1]**Failure to give usual warning before firing.** The plaintiff was employed by the defendant to work in a quarry. It was a part of the system under which the quarry was operated that the foreman should supervise the preparation of each blast and light the fuse to fire it, giving warning by a cry of "fire," so that the workmen in the quarry might run out of danger. The plaintiff was injured by a piece of rock thrown out from a blast, because the foreman had, through negligence, failed to give timely warning. *Held*, that the giving of warning was embraced in the duty owed by an employer to his employes, that the place where he sets them to work shall be kept safe; that the failure of the foreman to perform this duty carefully was imputable to the defendant as employer; and that such failure was not one of those obvious dangers of which the plaintiff as employe assumed the risk.

Error to Supreme Court.

Action by Henry Mooney against Belleville Stone Company of New Jersey. Plaintiff had judgment, which was affirmed in supreme court (38 Atl. 835), and defendant brings error. Affirmed.

[1]See *Berg* v. *Boston Co.* 17 M. R. 470 and notes.

Storage of powder magazine too close, a question of fact for the jury. *Bean* v. *Pioneer Co.* 66 Cal. 451; 6 Pac. 86; 56 Am. Rep. 106. *Tissue* v. *B. & O. R. R.* 112 Pa. 91; 3 Atl. 667.

Owner not bound to most expensive means to prevent fire-damp. *Berns* v. *Gaston Co.* 27 W. Va. 285; 55 Am. Rep. 304.

Degree of care required of mining company handling high explosives. Explosion of dynamite from vibration of engine. *Mather* v. *Rillston*, 18 M. R. 165.

On failure of foreman to notify new shift of a missed hole, defendant held liable. It is such a danger as a master is bound to give the servant notice of. *Shannon* v. *Cons. Tiger Co.* 24 Wash. 119; 64 Pac. 170.

Misfire, unloading hole. Trammer not bound to know that blow

HOWARD W. HAYES and JOSEPH COULT, for plaintiff in error.

SAMUEL KALISCH, for defendant in error.

DIXON, J. The plaintiff was struck by a piece of rock thrown out by a blast in the quarry of the defendant, and brought this suit to recover compensation for the injury. At the time he was in the employ of the defendant at the quarry, and was engaged as an attendant upon another workman who was painting a high derrick, and whom the plaintiff raised or lowered so as to facilitate his operations. The blasting was in charge of a foreman, whose duty it was to superintend the preparation of the blast, to light the fuse, and to warn the workmen, by crying "Fire," in time for them to run out of danger. On the occasion in question this warning was not given soon enough to enable the plaintiff to lower the painter to the ground and escape to a place of safety. Under the charge of the trial court, and the verdict of the jury, we must regard it as established that the plaintiff's injury resulted from the neglect of the foreman to give timely warning, and

would explode dynamite. *Grimaldi* v. *Lane*, 177 Mass. 565; 59 N. E. 451.

The slipping down of a lot of ore after a blast held on the facts of the case a risk of the trade and not an incident chargeable to negligence. *Bennett* v. *Tintic Co.* 9 Utah 291; 34 Pac. 61.

The same as to the explosion of a missed hole. *Anderson* v. *Daly Co.* 15 Utah 22; 50 Pac. 815.

The act of the foreman in negligently placing plaintiff too near to a blast held no cause of action—by a divided court. *Cullen* v. *Norton*, 126 N. Y. 1; 26 N. E. 905.

Recovery allowed on proof of the hiring of incompetent miners to handle giant powder. Some of the peculiar incidents of this explosive stated. *Scott* v. *Utah Co.* 18 Utah 486; 56 Pac. 305.

Scope of evidence in missed shot cases discussed. *Holy Cross Co.* v. *O'Sullivan*, 27 Colo. 237; 60 Pac. 570.

Complaint in missed shot case held insufficient. No duty on master to make inspection for missed shots. *Browne* v. *King*, 100 Fed. 562.

without any contributory negligence on the part of the plaintiff.

This presents the real question of law in the case, which is whether the negligence of the foreman in this respect is imputable to the defendant, the common master of the foreman and the plaintiff. As was said by counsel for the defendant, the judgment must stand or fall on the answer to that inquiry.

Under the cases of *Steamship Co.* v. *Ingebregsten,* 57 N. J. Law, 400, 31 Atl. 619, and *Comben* v. *Stone Co.,* 59 N. J. Law, 226, 36 Atl. 473, two views are suggested,—one, on behalf of the plaintiff, that the giving of proper warning was an essential part of the duty, owed by the employer to the workmen, of taking reasonable care that the places where the workmen were engaged should be kept safe, and therefore if, through negligence, the proper warning was not given, the employer's duty was not performed; the other, on behalf of the defendant, that the giving of the warning was only incidental to the foreman's work in preparing the blast and lighting the fuse, in which work the foreman was clearly a fellow-servant of the plaintiff engaged in a common employment, and therefore his negligence in that incidental service was not chargeable upon the common master.

On reflection, it will be perceived that the giving of warn-

Defendant not liable for furnishing iron instead of wooden tamping bar. *King* v. *Morgan*, 109 Fed. 446.

It is not contributory negligence for a miner to be warming his hands at the same fire where dynamite was being thawed. *Bertha Co.* v. *Martins, Admr.* 93 Va. 731; 22 S. E. 869.

Explosion of gas resulting from shooting an oil well. Verdict for injured bystander upheld. *Ohio Co.* v. *Fishburn*, 61 Oh. St. 608; 56 N. E. 457.

Company responsible for furnishing quick fuse without informing workmen that it burned faster than that heretofore used. *Hedlum* v. *Holy Terror Co.* (S. Dak.) 92 N. W. 31.

Defendant not liable for accident from pick striking loose piece of giant powder. *Kelly* v. *Cable Co.* 8 Mont. 440; 20 Pac. 669.

It is negligence to use dynamite which has been exposed to the weather. *Myrberg* v. *Baltimore Co.* 25 Wash. 364; 65 Pac. 539.

ing bore no direct relation to the foreman's work in preparing and firing the blast. The object of that work was the removal of rock, and such object would be attained as well without the warning as with it, if we leave out of consideration the safety of the workmen. Quite different are the conditions where a person using a tool or machine is obliged to see that the implement remains fit for use. In such case, the duty to examine is auxiliary and incidental to the duty to use, and, when a servant owes the latter duty to his master, he owes the former also. A failure to perform carefully this incidental duty of examination may result in damage to a fellow servant, but the common master is not responsible for such damage, because the duty neglected was not one owed by him. Outside of that duty there may have been a similar duty of inspection owed by the master to his servants, but the duties themselves are distinguishable from each other. In the present case, however, as already pointed out, the duty to give warning was not in any such sense subservient to the blasting of rock.

On the other hand, when we consider the general duty owed by an employer to his employes, to exercise reasonable care that the place where he sets them to work shall be kept safe (*Van Steenburgh* v. *Thornton,* 58 N. J. Law, 160, 33 Atl. 380), the propriety of including therein the duty of giving warning, in such circumstances as those now before us, becomes at once apparent. The danger of blasting was one frequently recurring, and its occurrence could always be foreseen, not by the workmen scattered about the quarry, but by any person charged with the duty of watching for it. If the danger was not foreseen, and proper warning given, the quarry became an unsafe place for the workmen, but it was made reasonably safe if such warning was given. It seems clearly to follow that on him whose duty it was to take care that the place should be kept safe was cast the duty of giving timely warning. We conclude, therefore, that it was part of the defendant's duty to the plaintiff that proper care should be

exercised in giving warning of an expected blast. In selecting the person who was to fire the blast as the person to give the warning, the defendant probably chose the man best able to perform that duty; but, as the defendant's responsibility extended beyond the selection of an agent, and included the warning itself, it must answer for negligence in the giving of warning, no matter how fit was the chosen agent.

Nor will the doctrine that servants assume the obvious risks of their employment save the defendant in this case; for that doctrine is not applicable to risk arising from negligence in the discharge of the master's duty to his servants. No doubt the plaintiff took the risks of the system under which he knew the quarry was worked. He would not be heard to complain that places of refuge close at hand were not provided, or that other possible precautions, which he saw were not in use, were omitted. But he had a right to expect that the precaution which the defendant had provided for the security of the quarrymen should be carefully observed, and he did not assume the risk of a negligent observance.

The judgment under review is affirmed.

For affirmance—THE CHANCELLOR, CHIEF JUSTICE, COLLINS, DIXON, GARRISON, LUDLOW, ADAMS, BOGERT, HENDRICKSON, KRUEGER, NIXON, VREDENBURGH.

For reversal—GUMMERE.

[1]WILLIAM PERIGO ET AL v. DAVID D. ERWIN.

(85 Federal 904. U. S. Circuit Court, District of Utah. March 4, 1898.)

[2]Before discovery of a vein on the public domain there can be no valid lode location.

[3]The order of the doing of the several acts which perfect a location is not material where the rights of third parties do not meantime intervene.

New discovery shaft after loss of original. The Star lode was discovered and location begun; then the Gopher claim was laid over it and allowed to go to patent. After this the owner of the Star made a new discovery on ground clear of the patent, restaked the claim and moved the notice to the new discovery, but made no new record; no third parties intervened. *Held*, that the Star was a valid claim dating from the sinking of the new discovery.

[4]Setting corner stakes on patented ground does not invalidate the claim.

This was a proceeding by William Perigo and Michael F. Clark against David D. Erwin in pursuance of an adverse claim to mining land.

GEORGE WESTERVELT, for complainants.

BROWN & HENDERSON, for defendant.

MARSHALL, District Judge. This suit is brought under section 2326 of the Revised Statutes of the United States, in

[1]Affirmed, 93 Fed. 608.

[2]Subsequent discovery validates location. *Brewster* v. *Shoemaker*, 28 Colo. 176; 21 M. R. —.

But not outside of discovery shaft. *Healey* v. *Rupp*, 28 Colo. 102; 21 M. R. —.

A lode claimant before discovery has no right to protection, except to his bare pedis possessio. *Gemmel* v. *Swain* (Mont.) 72 Pac. 662.

A notice without a discovery is a nullity. *Id.*

[3]Delay to stake immaterial if location finally complete before any hostile claim intervenes. *Crown Point Co.* v. *Crismon*, 39 Oreg. 364; 21 M. R. —. *Preston* v. *Hunter*, 67 Fed. 996.

[4]*Del Monte Co.* v. *Last Chance Co.* 19 M. R. 370; *Davis* v. *Shepherd*, (Colo.) 72 Pac. 57.

pursuance of an adverse claim filed in the land office by complainants, claiming to be the owners of the Star mining claim, against the defendant's application for a patent to the Kate F. mining claim. The Kate F. claim is entirely included in the Star, and, if the latter was ever validly located, it was prior in time to the location of the Kate F. But the original discovery of the Star was afterwards patented by the United States as a part of the Gopher mining claim, and the defendant contends that the issuance of such patent conclusively determines the invalidity of the Star location. The evidence shows that on September 5, 1888, the locator of the Star attempted to locate the same; and, in the absence of the patent for the Gopher, the evidence would justify a finding that the acts done by the locator on that day constituted a valid location of the Star. A vein was claimed to have been discovered; a stake and notice of location placed at the discovery point thereof. The claim was marked on the ground, and a copy of the notice recorded in the office of the mining recorder of the proper mining district. Nine days thereafter the Gopher mining claim was located, embracing within its limits about one-half of the Star location, including that part of the Star claimed as the place of the discovery of the vein. On June 20, 1889, the owners of the Gopher applied for a United States patent; and on May 11, 1892, a patent was issued to them for the claim so located, including the discovery of the Star claim. In July, 1889, Robert Gorlinski, a deputy mineral surveyor, surveyed the Star by direction of complainants, and placed stakes on the northeast and northwest corners thereof slightly differing in position from those of the locator. The southeast and southwest stakes were coincident with the patent stakes of a claim lying south of the Star, and did not require a change. All of the stakes were marked, and served to identify the claim so that its boundaries could be readily traced; but the northeast stake was on the Gopher claim, and the latter claim, as patented, included about one-half of the

Star claim. In the later part of the year 1890, complainant. Perigo, the original locator of the Star, went on that portion of the claim outside of the limits of the Gopher, sunk a shaft four feet deep, and there discovered the same vein disclosed in the Gopher. He then removed the stake, marked as a discovery stake, and originally placed within the Gopher at the original discovery of the Star, to the new discovery, but posted no new notice of location, and made no new record. The original notice of location of the Star did not describe the claim with reference to any particular discovery point. Since the year 1888, the complainants have done the necessary annual work on the Star, and the evidence does not show an abandonment of the claim. The Kate F. was located on October 25, 1895, and was a valid location, if the ground was then open to location. The mining claims in question are situated in the Uintah mining district, but there is no evidence as to any local rules or regulations of the miners of such district.

The right to a lode claim is initiated by the discovery of a vein, by a competent locator, upon the land of the United States open to exploration and purchase, and by the marking of the claim on the ground, so that its boundaries can be readily traced. Work on the ground located is a condition of the maintenance of the right. Before the discovery of a vein on the unappropriated public land of the United States, there can be no location. But the order in which the acts requisite to a location are done is immaterial, provided they are completed before the rights of other parties intervene. *Jupiter M. Co.* v. *Bodie M. Co.*, 11 Fed. 666; *Mining Co.* v. *Mahler*, 4 Morr. Min. R. 390. By the issuance of a patent to the owners of the Gopher for that claim, it was conclusively determined that complainants, by the attempted location of the Star, on September 5, 1888, acquired no right to the area in conflict with the Gopher. *Gwillim* v. *Donnellan*, 115 U. S. 45; 5 Sup. Ct. 1110. But that conflict area included the place

of discovery of the Star; so that it was in effect determined that prior to September 14, 1888, the locator of the Star did not discover a vein on the land of the United States open to exploration and purchase. But in July, 1889, the boundaries of the Star were re-marked on the ground by the surveyor, Gorlinski, as the agent of complainants; and in 1890, long prior to the location of the Kate F., the complainant Perigo discovered a vein on that part of the Star not in conflict with the Gopher, there sunk a shaft, and to that place removed his original discovery stake. The patenting of the Gopher did not determine anything more than the invalidity of the original location of the Star. The land now embraced in the Star, and not in conflict with the Gopher, still remained unappropriated public land of the United States, open to exploration and purchase by Perigo to the same extent as by others. This second discovery was after the restaking of the claim by Gorlinski, but no rights intervened the two acts, and the location must be deemed complete as of the date of the second discovery. *Erhardt* v. *Boaro,* 113 U. S. 527-536, 5 Sup. Ct. 560; *Mining Co.* v. *Mahler,* 4 Morr. Min. R. 390-399.

It is true there was no new notice of location, but the mining laws of the United States do not require any notice of location to be either posted on the claim or recorded, and there is no evidence of any local rules or regulations of the miners of the district affecting the question. *Book* v. *Mining Co.,* 58 Fed. 106-115. The fact that the northeast stake of the Star was placed on the Gopher claim, and that a portion of the latter claim is included within the Star claim as marked on the ground, does not invalidate the location. *Doe* v. *Tyler,* 73 Cal. 21, 14 Pac. 375; *West Granite Mt. M. Co.* v. *Granite Mt. M. Co.,* 7 Mont. 356, 17 Pac. 547. At the time of the second discovery, the evidence clearly shows that the locator only intended to claim that portion of the premises not in conflict with the Gopher.

There is nothing in the case of *Belk* v. *Meagher,* 104 U. S. 279, supporting the respondent's contention. In that case, Belk attempted to locate land already held by others under a valid subsisting location, and sought to maintain his right because, after his invalid location, the land became open to relocation, by reason of the failure of the original owners to do the required annual work thereon. But Belk made no relocation, and unsuccessfully urged a title initiating in a trespass to the land trespassed on. In this case no claim is made to the land included in the Gopher. No claim was so made when the location of the Star became an accomplished fact on its second discovery. Considering the location as then made, no act necessary to it can be construed into a trespass, unless it be the adoption of a staking of the claim which included a portion of the Gopher, and a placing on that claim of one of the stakes. To hold that such a trespass invalidates a location with respect to land not trespassed on would render titles to unpatented mining claims most insecure. While the mining laws of the United States require that a location shall be so marked on the ground that its boundaries can be readily traced, they do not provide for a maintenance of such marking. If a location be once validly made, the stakes marking it may disappear, and nothing be left to identitfy the ground to any one other than the locator, without invalidating the claim. If thereafter another qualified locator bases a location on a discovery of a vein within the first claim, not then subject to relocation, he gains no right because he has discovered no vein on the land of the United States open to exploration; but if, having discovered a vein on the land so open to exploration, he unwittingly places one or more of his stakes on the land already claimed, there seems no reason to avoid his claim to the unappropriated land by reason of the mistake. In accordance with the views here expressed, there will be a decree for the complainants.

ROBERT E. HAMILTON v. E. A. HUSON ET AL.

(21 Montana 9; 53 Pac. 101. Supreme Court. March 21, 1898.)

A voluntary abandonment on the trial by plaintiff of one ground of recovery eliminates all questions on appeal touching the ground thus abandoned.

Possession without location. There can be no right of possession to a mining claim which is not based on a valid location.

Where an answer is treated as sufficient by the parties in the trial court, the question of its sufficiency cannot be raised on appeal.

Appeal from District Court, Fergus County; Dudley Du Bose, Judge.

Action by Robert E. Hamilton against E. A. Huson and another. From a judgment for defendants, plaintiff appeals. Affirmed.

FRANK E. SMITH and C. B. NOLAN, for appellant.

A verbal transfer followed by change of possession amounts to a conveyance. *Lockhart* v. *Rollins*, 16 M. R. 16.

An instruction that if ground was not "in the actual possession of one entitled thereto" leaves a question of law to the jury and is error. *Jordan* v. *Duke*, (Ariz.) 36 Pac. 896.

Possession good to recover in ejectment against naked intruder. *Haws* v. *Victoria Co.* 160 U. S. 303. *Sears* v. *Taylor*, 5 M. R. 318.

Possession is good title to water against diverter who shows no better title. *Cardoza* v. *Calkins*, 18 M. R. 689.

Right of actual occupant where his paper title does not cover his improvements. *Garrard* v. *Silver Peak Mines*, 82 Fed 578.

As against an intruder possession is *prima facie* title, but it yields to a valid location. *Wilson* v. *Triumph Co.* 19 Utah 66; 56 Pac. 300. *Belk* v. *Meagher*, 1 M. R. 515. *Sweet* v. *Webber*, 7 Colo. 450; 4 Pac. 752. *Becker* v. *Pugh*, 15 M. R. 304. *Gleeson* v. *Martin White Co.* 9 M. R. 435. *Du Prat* v. *James*, 15 M. R. 341.

Twenty years' possession held full proof of ownership though no paper title from locators. *Risch* v. *Wiseman* 36 Oreg. 484; 20 M. R. —.

Analysis of what constitutes possession. *Valcalda* v. *S. P. Mines*, 19 M. R. 233.

CARPENTER & CARPENTER, WALSH & NEWMAN, and RUDOLPH VON TOBEL, for respondents.

PEMBERTON, C. J. Plaintiff alleges in his complaint that he is the owner, in possession, and entitled to the possession, of three certain placer mining claims in Fergus county. He alleges that in February, 1897, the defendants wrongfully entered upon these mining claims, and cut down a large amount of timber and trees growing thereon; that they are removing the same, and threaten to continue to cut down and carry away the timber. Plaintiff asks for damages, and for a perpetual injunction restraining the defendants from cutting down and removing the timber.

The answer denies the allegations of the complaint as to the ownership and possession of the mining claims in controversy, as well as the allegations as to damages, and sets up affirmatively that defendant Huson is the sole owner of the premises in dispute. Defendant Maloy disclaims any interest in the ground, and alleges he was an employe of defendant Huson. By stipulation, the allegations of new matter contained in the answer are denied.

At the close of plaintiff's evidence, the defendants filed the following motion for a nonsuit: "Defendants move at this time for a nonsuit on the following grounds, to wit: First, that the evidence does not show any title or right of possession in the plaintiff; second, that the evidence does not show any actual possession by the plaintiff of the premises described in the complaint, or any part thereof; third, that the evidence does not show any damage to the plaintiff; fourth, that the evidence does not show that the defendants, or either of them, or their agents, were guilty of any trespass upon the premises described in the complaint, or any of them, either by cutting trees or otherwise; that the evidence does not show that the damage, if any, resulting from the cutting of the timber, would be irreparable; that the evidence does not show

that the plaintiff, or his grantors, are citizens of the United States, or have declared their intention to become such."

This motion was granted by the court. Judgment was rendered for defendants for costs. From this judgment, and an order overruling a motion for a new trial this appeal is prosecuted.

As disclosed by the record, plaintiff claimed to own, and be entitled to the possession of, the mining claims in question, as the purchaser thereof from the Buchanan Brothers and one Brooks, who, it is contended, located the claims in the year 1881. It is also contended that the Buchanans relocated the mining claims in 1888. The relocation notice is in the record. It is defective, in that it is not sworn to by any one. After the introduction in evidence of the certified copy of the deed from the Buchanans and of the relocation notice, plaintiff discovered that the notice of relocation of the claims was invalid; and thereupon abandoned his claim to a right of recovery, on the ground of title or right of possession to the ground, by reason of any valid location of the mining claims having ever been made, and sought to recover solely on the ground of actual possession. So that we are not called upon to determine any question as to the location of the mining claims or the validity of any notice of location. These questions are all eliminated from the case by the plaintiff's voluntary abandonment of them on the trial.

Did the plaintiff, then, have any such possession of the mining ground in controversy as would enable him to recover in this case? The ground in controversy is mining ground, and this case must be determined by the law in relation to such land.

In *Belk* v. *Meagher,* 104 U. S. 284, it is said: "The right of possession comes only from a valid location. Consequently, if there is no location, there can be no possession under it."

In *Garfield M. Co.* v. *Hammer,* 6 Mont. 53, 8 Pac. 155, this court said: "Therefore, when the respondent's claim of

ownership and right to the possession were put in issue by the answer, it devolved upon the respondent to show affirmatively upon the trial that it had complied fully with all the requirements of the act of congress and the local rules and regulations relative to the location of mining claims; that is, that it had made a valid location."

In *McKay* v. *McDougal*, 19 Mont. 488, 48 Pac. 988, this court said: "When it comes to establishing the fact of ownership, if at issue, then plaintiff must support his pleading by claim from a paramount source of title, or by evidence of compliance with the mining laws of the United States and of the state."

In this case there is no pretense of a valid or any other kind of location of the mining claims in dispute; hence there could be no such possession as would enable plaintiff to recover.

Even if it be conceded that plaintiff was entitled to the possession of that part of the mineral land in question which he actually occupied and was mining, still there is no evidence that the defendants cut any timber or trees thereon, for the evidence shows that the defendants cut no timber at a point nearer than from 800 to 1,500 feet from the ground actually occupied by plaintiff. The mining ground the plaintiff claims to be in the actual possession of runs up the creek for more than one mile and a half, and is from 100 feet to 20 rods wide. It makes all the crooks and turns of the stream. The plaintiff claims to be mining, and is in actual possession of, only a small portion of this remarkable strip of ground, near the end thereof furthest down the creek. It is ridiculous to say that he is in actual possession of all this strip of land, or that, by virtue of such possession, he has a right of action for damages against a party who cuts timber thereon 800 or 1,500 feet away from the portion in his actual possession.

Counsel for appellant say the authorities hold "that if a person having possession of a part of a claim not properly

located makes a transfer of the property by deed, describing the same by metes and bounds, to a grantee, and the grantee claims by virtue of such transfer, this would give constructive possession to the whole tract as against a mere intrduer," and cite authorities in support of this position. But in the case at bar the plaintiff is not claiming under a deed from a grantee who claims under any sort of a location. Plaintiff abandoned on the trial of the case all pretended title under the deed from the Buchanans, and all right to the possession of the mining claims by virtue of any location or compliance with the mining laws. He claims by virtue of actual possession alone. There is not a particle of evidence in the case showing, or tending to show, that the defendants ever intruded upon, or cut down and removed, any timber from any ground of which the plaintiff had actual possession. We think the evidence of plaintiff, taken as a whole, did not show or tend to show that he was entitled to any judgment or relief against the defendants.

Counsel for appellant contend that the denial in the answer "of every material allegation in the complaint is not sufficient," and that plaintiff is entitled to judgment on the pleadings. In the court below, the parties treated the denial as good and sufficient, and the case was tried on that understanding. This question cannot be raised now, the parties having treated the pleadings as sufficient in the court below.

The judgment and order appealed from are affirmed.

Affirmed.

HUNT and PIGOTT, JJ., concur.

SCHWAB v. BEAM ET AL.

(86 Federal 41. U. S. Circuit Court, District of Colorado. March 30, 1898.)

A placer location ex vi termini imports an appropriation of all waters covered by it, so far as such waters are necessary for working the claim, especially when the location covers both banks of the stream, and there can be no abandonment of the water as distinguished from the land or of the land as distinguished from the water.

Cesser to mine no loss of water right. Where a patent issues for a mining claim, if the owner finds mining unprofitable, and holds the property for sale as a mill site, or for an electric power plant or some manufacturing establishment, he does not thereby lose the water right which he had as a miner.

Colorado constitution, in re water rights. Article 16, § 6, Const. Colo., which provides that "the right to divert unappropriated waters of any natural stream for beneficial uses shall never be denied," applies only to unappropriated waters, and not to a case where, by the location of a placer claim, the water has been appropriated.

Idem. Riparian rights. Nothing in the constitution of Colorado, or in the law relating to irrigation, modifies or changes the rule of common law that for manufacturing, mining, or mechanical purposes each riparian owner may use the waters of running streams on his own premises, allowing such waters to go down to subjacent owners in their natural channel.

ROGERS, CUTHBERT & ELLIS, for complainant.

PATTERSON, RICHARDSON & HAWKINS, for defendants.

Appropriation gives a vested right to water and all subsequent titles are subservient thereto. *Hill* v. *Lenormand*, (Ariz.) 16 Pac. 266.

Ditch owner must return surplus—may detain only for a reasonable time. *Stanford* v. *Felt*, 71 Cal. 249; 16 Pac. 900.

Title to water may be acquired by prescription. *Green* v. *Carrotta*, 72 Cal. 267; 13 Pac. 685.

Notice gives reasonable time for appropriation. *Dyke* v. *Caldwell*, (Ariz.) 18 Pac. 276.

The common law on riparian rights is inapplicable to the physical features of the Pacific slope. *Reno S. Wks.* v. *Stevenson*, 20 Nev.

HALLETT, District Judge. Complainant is the owner of seven placer-mining claims on the north fork of the San Miguel river, in the county of San Miguel, called "Boston," "Keystone," "Keystone Extension," "Washington," "Colorado," "Pekin," and "San Miguel." All of the claims are traversed by the river, excepting the Keystone Extension, to which water from the river is conducted by means of a flume. The several claims were located prior to the year 1882, and patents were issued in that year to complainant's grantors. Some of the claims were worked as placers, and the waters of the river were used for that purpose prior to the year 1889. In that year the waters of the river were diverted near the east end of the Keystone placer for the purpose of hydraulic mining upon several of the claims, and work was carried on extensively in the years 1889 to 1892. From 1892 to 1897 but little was done in the way of mining, but there was always

269; 21 Pac. 317; 19 Am. St. Rep. 364. *Isaacs* v. *Barber*, 10 Wash. 124; 38 Pac. 871.

A homestead claimant's rights to water flowing through his grounds are subject to the rights of a prior appropriator. *So. Uba Co.* v. *Rosa*, 80 Cal. 333; 22 Pac. 222.

The filing of a homestead entry prevents subsequent diversion of water running across the land. Review of congressional legislation on this subject. *Starr* v. *Beck*, 133 U. S. 541.

The right of appropriation on Pacific slope was established law before the passage of any congressional act on the subject. *Isaacs* v. *Barber*, 10 Wash. 124; 38 Pac. 871.

All uses must be beneficial. Irrigation has no precedence over mining use. *Union Co.* v. *Daugberg*, 81 Fed. 73.

The surface flow when in a well-defined channel is a part of the stream and subject to appropriation. Rights to seepage water. *Howcroft* v. *Union Co.* (Utah) 71 Pac. 487.

The appropriation of water for all useful purposes stands upon an equal footing. *McDonald* v. *Bear River Co.* 1 M. R. 626.

The text case was taken to the Supreme Court of the United States and there argued but before submission it was settled and dismissed. The important point held in its first syllabus is by no means accepted by all the profession. Mining Rights, 11th Ed. p. 180. The case is cited without comment in 1 Lindley, § 428, and 1 Snyder, § 388.

an agent in charge, and some effort was made to keep up the flume, and to use water therefrom at different times. The testimony as to what was done upon the property in those years is highly conflicting, and leads to the result that complainant and his grantors were in actual possession, and that work was not done with a view to profit or development. In the month of August, 1897, respondents located the Yukon placer in the valley of the San Miguel river, at a point somewhat south of the Pekin placer, owned by complainant. The south fork of the river unites with the north fork on the Pekin placer. The Yukon placer may touch the south fork of the river, but it does not extend to the united streams, or to the north fork, which traverses the Pekin placer from end to end. Afterwards, and in the month of September following, respondents located a flume and water right on the north fork of the San Miguel river, about 1½ miles east of the Yukon location, and near the northeast corner of complainant's Boston claim. The head of the flume is on the Denver placer, which is probably owned by respondents. From thence the line of the flume is laid in a westerly direction on the mountain side, slightly above complainant's flume, and in the course of the San Miguel river, to a point about 1,150 feet east of the west end of the Pekin placer, and thence across the Pekin placer and the San Miguel river to the Yukon placer. In its course from east to west it traverses the Keystone and the Keystone Extension placers, belonging to complainant, for a distance of about 2,500 feet. In its southerly course across the Pekin placer its length is about 1,200 feet. Thus it appears that the proposed diversion of the waters of the San Miguel river which the complainant seeks to restrain is at the highest point on the course of the river to which complainant's property extends. From thence the water is to be carried outside of the channel of the river, and on the north side of the channel, over two of complainant's locations, and north of three or more of them and across one of them to

a point on the Yukon placer south of the Pekin placer. Whether the water liberated at that point on the Yukon placer would be available for use on complainant's San Miguel placer, which is furthest west of his locations, was not stated at the bar, and may not be disclosed in the record. Sufficient appears to show that the effect of respondents' diversion would be to deprive complainant of water in the channel of the river on six of his locations during some part of the year. Respondents' appropriation is 20,000 miners' inches, which the testimony shows would be all the water in the channel of the river at certain seasons of the year, although at other times there is much more flowing in the channel. The purpose for which the water is to be used on the Yukon placer is for making electric power and lights, although it is said that some mining has been done by respondents in that locality. Many witnesses were examined to show the nature and extent of the diversion of the waters of the San Miguel river in the year 1889, and subsequently by complainant's grantors, and whether the use of the flume and ditch then constructed on the property was continued by complainant after the year 1892. Respondents' counsel declared in argument that the flume and ditch were abandoned after 1892 by complainant's grantors and himself, and that the waters of the river were subject to a new appropriation in August, 1897. The court is of the opinion that the matter of the diversion of the waters of the river by complainant's grantors in the year 1889 is not controlling; although, if it were necessary to determine the fact, the court would be inclined to find that the waters of the river were fully appropriated at that time, and that there is no satisfactory evidence of abandonment at any time afterwards. A placer location *ex vi termini* imports an appropriation of all waters covered by it, in so far as such waters are necessary for working the claim. This is true especially when the location covers both banks of the stream, because there is a reasonable presumption that the

locator intends to work the channel and the banks, wherever he may find pay dirt. A placer claim cannot be worked without water. Where water is scarce, a small stream may be made to suffice. Every one who is in any way familiar with the subject knows that the miner always prefers to have a copious supply. Where, as in this instance, the work is carried on by hydraulic force, the volume of water must be large. No doubt is entertained that the locators of the several claims now owned by complainant intended to appropriate the waters flowing in the channel of the river as well as the channel, the banks, and all territory embraced within the locations to the business of mining, and the title to the water is the same as the title to the land. There can be no abandonment of the water as distinguished from the land, nor of the land as distinguished from the water. Each is without value when separated from the other, and therefore they cannot be legally divorced. It is said, however, that complainant, having found the business of mining to be unprofitable, no longer intends to work his claims, and now holds them for sale as a mill site, or as a site for an electric power plant or some manufacturing establishment. Be it so; the government has issued patents for the claims, and the title of complainant is now absolute for any purpose to which they may be put. A patent for agricultural land does not limit the use of the patentee to tilling the soil which may be conveyed by the patent. No more is a patent for mineral land, whether lode or placer, restrictive of the use of the territory which may be conveyed. A placer claim has been used as a town site apparently with the approval of the supreme court of the United States. *Smelting Co.* v. *Kemp,* 104 U. S. 636. All other uses to which land may be put must be equally open to the grantee after title has passed from the government.

Respondents rely very much on section 6, article 16, of the constitution of the state of Colorado, which declares: "The

right to divert unappropriated waters of any natural stream for beneficial uses shall never be denied." This language, it will be observed, is applicable to the unappropriated waters of a natural stream. If, as we assume, the location of complainant's placer claims on the San Miguel river was an appropriation of the waters of that river so far as it runs through the several claims, this section cannot control the question under consideration. The waters were appropriated when the claims were located, and the owner of the claims is entitled to have them *ut currere solebat*, without diminution, subject to the reasonable use of other riparian owners higher up on the course of the stream. No question arises under the last clause of section 6 of the constitution of the state, cited above, because complainant and respondents are each of the manufacturing class, within the meaning of that section. Counsel for respondents suggested in argument that electric lights were to be classed as a domestic use, but he was unable to say much in support of that construction. Clearly enough, the business of making electric lights and power is a sort of manufacture, and of the same class as mining, or other use of water power. Therefore the parties are upon an equal footing in respect to the use which they intend to make of the waters of the San Miguel river. In this connection it may be observed that washing gravel by hydrostatic pressure from a channel or bank of a river is not very far removed from running a stamp mill by water power, or running dynamos for making electricity. There is some difference in the machinery and appliances of the several kinds of work, but the power is the same. The use of the water of the San Miguel river, in 1889, for hydraulic mining, was an exercise of water power very similar to that which respondents now demand for operating a power plant. Both parties stand upon placer locations, and the doctrine of first appropriation seems to support complainant's locations, as they are many years older than respondents' locations, made in 1897.

Many authorities cited by counsel expound the law relating to the irrigation of agricultural lands in arid regions. An early advocate of the right to appropriate water for irrigating lands, as always understood and maintained in this state, the author of this opinion desires to recognize and enforce the principle on which it stands in every case to which it may be applicable. It is believed that the chief purpose of article 16 of the constitution of the state of Colorado is to maintain and establish the wise principle of appropriation and continual use, which was fully understood by the makers of that instrument. But nothing in the constitution of the state or in the law relating to irrigation in any way modifies or changes the rules of the common law in respect to the diversion of streams for manufacturing, mining, or mechanical purposes. In Colorado, as elsewhere in the United States, the law is now, as it has been at all times, that for such purposes each riparian owner may use the waters of running streams on his own premises, allowing such waters to go down to subjacent owners in their natural channel. The injunction will be allowed according to the prayer of the bill.

JAMES NESBITT v. THE DELAMAR'S NEVADA GOLD MINING CO.

(24 Nevada 273; 52 Pac. 609; 53 Pac. 178. Supreme Court. March 30, 1898.)

[1]**Work done by a mere trespasser** or stranger to the title will not inure to the benefit of the locator, but when the mine is represented by an owner, and annual work is performed by or at the instance of the owner or some one in privity with him, it is sufficient.

Acts of purported owner operative to save claim. The certificate in lieu of annual labor was filed by a party who had color of right to be one of the owners with the knowledge and assent of one of the undisputed owners. *Held*, that the act was done for the benefit of the common title, was valid to maintain it, and could not be assailed to aid a hostile location.

On Rehearing.

[2]**Action by one cotenant for common benefit.** Where a complaint alleges that plaintiff and his co-owners are in possession as tenants in common, and prays that the title be quieted in him and his cotenants, the action is not for the benefit of plaintiff alone, but for himself and his cotenants.

Adverse claim by one owner. A notice of adverse claim to a mine may be filed in the United States land office by one of several joint claimants, on behalf of all, without having a power of attorney from his co-claimants.

Color of title. Under Gen. St. § 3253, providing that the purchaser of real estate under execution sale acquires all the title of the judgment debtor, and requiring a certificate of sale to be given, the certificate shows color of title in the purchaser.

Patent bars adverse titles. In proceedings in the United States land office to obtain a patent to a mine, all adverse claims not filed within the prescribed time are waived.

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[1]Work done by other parties on account of the owners is valid. Tunnel run for two separate claims may be credited to both. *Book* v. *Justice Co.* 17 M. R. 617.

May be performed on one of a group of claims. *Little Dorrit Co.* v. *Arapahoe Co.* (Colo.) 71 Pac. 389.

Assessment work outside the claim must be of value to the claim intended to be protected. *Id.*

[2]An adverse claim may be filed and suit supporting it maintained by a party who has covenanted to convey and the fact that the intending purchaser and not the plaintiff is the party actually in pos-

Appeal from District Court, Lincoln County; G. F. Talbot, Judge.

Action by James Nesbitt against the Delamar's Nevada Gold Mining Company, a corporation. From a judgment for plaintiff, and from an order denying a new trial, defendant appeals. Affirmed.

HENRY RIVES and T. J. OSBORNE, for appellant.

GEORGE S. SAWYER, for respondent.

BONNIFIELD, J. W. M. Davidson filed his application in the United States land office at Carson City for a patent to the Sleeper Mine, situated in Ferguson mining district, Lincoln county; and the plaintiff filed in said office a protest against the issuance of such patent, and an adverse claim to that portion of the Sleeper Mine embraced within the boundaries of the Fraction Mine, claiming said Fraction Mine for himself and his alleged co-owners, George Nesbitt and A. Borth, as tenants in common.

This action was brought by the plaintiff against said W. M. Davidson, pursuant to section 2325 of the Revised Statutes of the United States and section 1900 of the General Statutes of Nevada, to determine the right of possession to the Fraction Mine.

session will not defeat a bill to quiet title on that ground. The court recognizes that such a suit has a direct connection with the land office proceedings and looks for an adjudication of title, not to a technical question of proper parties. *Wolverton* v. *Nichols*, 15 M. R. 309.

It is a proceeding in rem. *Hamilton* v. *S. Nevada Co.* 15 M. R. 315.

The suit is not to determine the right of contestants to a patent, but to determine the right of possession. *Lavagnino* v. *Uhlig*, (Utah) 71 Pac. 1046.

Where plaintiff shows no right of possession he cannot avail himself of the rights of a third party who did not adverse. *Id.*

The case was tried before the district court in and for said county, without a jury. A judgment was given in favor of said plaintiff and his co-tenants. A notice of motion for new trial was given, and statement on motion made by W. M. Davidson, the defendant. Before said motion was heard, Delamar's Nevada Gold Mining Company was substituted for said Davidson, as defendant. The motion was denied. The appeal is taken from the judgment, and from the order denying a new trial.

The notice of motion for new trial designates as grounds thereof: First, insufficiency of the evidence to justify the judgment, and that the judgment is against law; second, errors in law occurring at the trial, and excepted to by the defendant. The court made no express findings. One of the specifications of error is that the judgment is not supported by the evidence. The inquiry, then, is presented: Is there substantial evidence to support the judgment?

The evidence shows that W. De Beck, H. Stevens, and A. Borth located the Fraction Mine on the 12th day of May, 1892, and that they performed all the acts required to make a valid location; that the Nesbitt Brothers and A. Borth did assessment work in each of the years 1895, 1896 and 1897 to the full amount required by law; that the Sleeper Mine was located on the 1st day of January, 1895, and the boundaries thereof take in the Fraction Mine; that no work was done on the Fraction Mine in either of the years, 1893 and 1894, but that the Nesbitt Brothers, in December of each of said years, had a notice recorded in the county recorder's office where the original notice of the location of the Fraction Mine was filed, declaring their intention in good faith to hold and work said mine.

The plaintiff claimed that he and George Nesbitt, his brother, had acquired all the right, title, interest and claim of said W. De Beck and H. Stevens in and to the Fraction Mine, and that they and A. Borth were the owners of said

mine as tenants in common. In support of this claim, he offered in evidence a judgment recovered by the Nesbitt Brothers against W. De Beck for $212, in the justice's court of Pioche township, in Lincoln county, and a judgment recovered by them against said H. Stevens on the same day, and in the same court, for $160, together with all the records, papers and proceedings of said court in said cases, to the introduction of which counsel for defendant objected on several different grounds, and the court excluded them on the ground, in effect, that the record showed that the justice's court had not acquired jurisdiction over either defendant in either of said cases.

It appears that on the 15th day of July, 1893, the justice's court issued an execution on each of said judgments, and specially deputed A. J. Denton, pursuant to the provisions of section 571 of the civil practice act, to serve the same; that, on the 11th day of August next following, said special officer sold to the Nesbitt Brothers all the right, title, and interest of said De Beck and Stevens, respectively, in and to the Fraction Mine, under and in pursuance of the commands of said executions; that, on said last date, said officer executed to the Nesbitt Brothers a certificate of said sales, respectively, and filed a duplicate copy thereof in the office of the county recorder, on the 19th day of August, 1893; that on the 19th day of February, 1894, said officer executed to the Nesbitt Brothers deeds of conveyance of the said interest of De Beck and Stevens, respectively, in said mine, no redemption having been made. The certificates and deeds were admitted in evidence, against the objections of the defendant, but for the purpose only of showing or as "tending to show color of title and adverse possession."

Counsel for appellant contends, and his theory is, in effect, that, said judgments being void, the certificates of sale and the deeds executed to the Nesbitt Brothers are void, and do not tend to show color of title or adverse possession to said

Fraction Mine; that all acts done by the Nesbitt Brothers with reference to said mine are nugatory, and can avail the plaintiff nothing in this action; that they acquired no right to file said notice in 1893, nor in 1894, because the certificates of sale gave no right of entry upon the Fraction Mine; and that said deeds gave no right to such entry; that the original locators of the Fraction Mine having failed to perform the required annual labor for the years 1893 and 1894, and having failed to file any notice of intention to hold and work the mine, as required by the acts of congress in that respect, and the Nesbitt Brothers not having taken actual possession until the fall of 1895, the mine had been forfeited, and was subject to relocation, when the defendant and James Murphy located the Sleeper Mine.

The vital question in this case is whether the said notices the Nesbitt Brothers caused to be recorded, of their intention to hold and work said mine, had the legal effect of saving the mine from being subject to relocation for any period of time. In determining this question, it is not necessary to consider what legal value said certificates of sale and deeds may have, if any, except as evidence tending to show the good faith of the Nesbitt Brothers and their co-claimant, A. Borth, in all that they did with reference to said mine.

The evidence discloses that, from the date of said sales, A. Borth regarded the Nesbitt Brothers as having acquired all the interests of De Beck and Stevens in said mine, and that the Nesbitt Brothers and A. Borth mutually recognized each other as co-owners of said mining claim, as tenants in common; that upon consultation and agreement between them, and at the request of A. Borth, the Nesbitt Brothers had said notices recorded in lieu of performing the annual labor; that said notices were recorded for the benefit of all three, and to represent said mine; that, in all things done in the premises, all of said claimants acted in good faith, and in the belief that the Nesbitt Brothers acquired all the right, title, and in-

terest of De Beck and Stevens in and to said mine, by virtue of said judgments, and sales made thereunder.

If the Nesbitt Brothers, at the instance of A. Borth, and in pursuance of an agreement between them and him, had in good faith performed $100 worth of labor or improvements on said mine in 1893 and 1894, pursuant to the provisions of section 2324, Rev. St. U. S., certainly the mine would not have been subject to relocation on the 1st day of January, 1895, although it might turn out on judicial investigation that the Nesbitt Brothers had no legal or equitable title to any interest therein. Such labor would have represented the mine, and defeated any relocation made in 1895. It is true that work done by a mere trespasser or stranger to the title will not inure to the benefit of the locator. *Little Gunnell M. Co.* v. *Kimber,* 1 Morr. M. R. 536, Fed. Cas. No. 8,402. But when the mine is represented by an owner, and annual work performed by or at the instance of the owner or some one in privity with him, it is sufficient. 2 Lindl. Mines, § 633.

Evidently, it was the intention of congress, in passing the special acts of 1893 and 1894, suspending the requirements of section 2324 of the Revised Statutes as to the annual labor on mining claims, that the recording of the prescribed notice should have the same legal effect as performing the labor.

The act of 1893 provides "that no mining claim which has been regularly located and recorded as required by the local laws and mining regulations shall be subject to forfeiture for non-performance of the annual assessment work for the year eighteen hundred and ninety-three; *provided,* that the claimant or claimants of any mining location, in order to secure the benefits of this act, shall cause to be recorded in the office where the location notice or certificate was filed on or before December thirty-first, eighteen hundred and ninety-three, a notice that he or they in good faith intend to hold and work said claim." The act of 1894 was the same in

terms as the act of 1893, except the year of 1894 was substituted for the year 1893.

The Fraction Mine being represented by one of the locators, A. Borth, and the said Nesbitt Brothers having had said notices recorded in pursuance of said agreement, and at the instance of said Borth, as well as of themselves, and under the honest belief of all three that the Nesbitt Brothers had legally acquired all the right, title, and interest of the other two locators by virtue of said judgments and sales made thereunder, we are of opinion that said mine had not been forfeited nor subject to relocation when the location of the Sleeper Mine was made, and, therefore, that the location of the Sleeper Mine was and is invalid in so far as it covers the Fraction Mining claim.

The contention of counsel that, in the sense of said Statutes of 1893 and 1894, "the claimant or claimants" authorized to secure the benefits of said acts must have a valid claim to the mining ground claimed, is not, in our opinion, tenable. In case of conflicting locations of the same mining claim, the respective claimants are both required to perform the annual labor; and in 1893 and 1894 they were both required to do the required assessment work, or cause the prescribed notice to be recorded in lieu thereof; yet in no such case could both have a valid claim to the same mine.

Counsel contends that the judgment is against law, in that it quiets the title in the plaintiff, which title they allege "never existed, and which title, if it exists at all, is still in De Beck and Stevens, and with which title the plaintiff has shown neither a legal nor an equitable connection; and, neither of them (De Beck and Stevens) being parties to this action, that title cannot be affected by this action, nor can it be quieted in a party who is a stranger to it; and especially it cannot be quieted in favor of such stranger as against a *bona fide* prior occupant, claiming under color of title superior to that set up by the plaintiff."

The answer to this contention is that the title to the Fraction Mine was quieted in the plaintiff and his said co-claimants, one of whom is A. Borth, one of the original locators; that, as we think we have shown, said mine has not been subject to forfeiture, and hence the defendant's relocation is invalid; that if the Nesbitt Brothers have no valid title to De Beck and Stevens' interest, and have not otherwise a valid interest in said mine, A. Borth has the exclusive right of possession as against them, as well as against the defendants; and the invalidity of the claim of the Nesbitt Brothers could not avail the defendant, or make valid or strengthen his claim, nor could it invalidate or impair the validity of the claim of A. Borth. Any question that may exist, if any, between any of the locators of the Fraction Mine and the Nesbitt Brothers as to the rights of the latter claimants with reference to said mine, is a matter solely of their own concern, and not a matter in which the defendant has any legal interest.

We are of opinion that the evidence is sufficient to support said judgment, and that said judgment is not against law. The judgment and order appealed from are therefore affirmed.

ON PETITION FOR REHEARING.

BONNIFIELD, J. The first ground urged for a rehearing is "that the plaintiff does not pretend to sue except in his own behalf, and it certainly affirmatively appears from the complaint and the admissions in the case that he alone filed a protest in the United States land office against defendant's application for a patent; and therefore the appellant claims that this court erred in assuming, as it does in the opinion, that the plaintiff claimed, in his protest or in this action, said Fraction Mine for himself and his alleged co-owners, George Nesbitt and A. Borth, as tenants in common."

Counsel are in error in the above contention. By the complaint it is alleged that the plaintiff and his co-owners, as

tenants in common, are in possession, and entitled to the possession, of the Fraction Mine, etc.; also, that the plaintiff filed in the United States land office his and his co-tenants' adverse claim to that portion of the Sleeper Mine embraced within the Fraction Mine; and plaintiff prays that the title to said Fraction Mine be quieted in him and his co-tenants, and such is the decree of the trial court. The adverse claim filed as aforesaid alleges, substantially, that the affiant (the plaintiff here) and his co-tenants (naming them), George Nesbitt and A. Borth, are the owners, etc., of the Fraction Mine, as tenants in common.

By the answer it is alleged "that said plaintiff and the said George Nesbitt and A. Borth base their rights to such possession [of a portion of the Sleeper Mine] upon the alleged pretended location called by them the Fraction Mine. * * *" Where a claim is owned by more than one individual, it is customary to select one to act in behalf of all, for which purpose a special power of attorney is executed, and filed with the application; but this is not necessary. Lindl. Mines, § 681. The practice of the department has been to recognize such application, signed by one joint owner in behalf of himself and the remaining owners. Id.; *Ayers* v. *Daly,* 3 Copp, Landowner, 196. Unquestionably, an act manifestly done by one co-owner for the benefit of all would be presumed to be authorized, or at least ratified. Lindl. Mines, § 681.

The contention of petitioner that neither the certificates of sale of the interests of De Beck and Stevens in the Fraction Mine, nor the deeds of the officer, show color of title in Nesbitt Bros., we think is not correct. The certificates are regular in form, and fully comply with section 3253, Gen. St. Nev., which provides that: "Upon a sale of real estate [under execution] the purchaser shall be substituted to and acquire all the right, title, interest and claim of the judgment debtor thereto, and when the estate is less than a freehold of two years' unexpired term, the sale shall be absolute.

In all other cases the real property shall be subject to redemption as provided in this chapter. The officer shall give to the purchaser a certificate of sale containing, * * *. A duplicate of such certificate shall be filed by the officer in the office of the recorder of the county." All of which the officer did.

The deeds are also regular in form, and purport to convey by the officer said interests of De Beck and Stevens in said mine to Nesbitt Bros.

Petitioner further claims that, if the judgment is affirmed, the patent will be issued to the plaintiff, and that De Beck and Stevens will be robbed of possibly immensely valuable property. But it does not appear that De Beck and Stevens would be robbed of anything, or, if they were, how the appellant would be affected thereby. It does not appear that they have, or claim to have, any interest in said mine. It appears that they left the state about five years ago, and there is no intimation that they ever intend to return. It appears that after the location of said mine they did nothing to preserve their interests therein, and that nothing was done for them in that respect. Besides, this action is a continuation of the proceedings instituted in the United States land office; and it does not appear that De Beck and Stevens, or either of them, filed any protest or adverse claim in that office, or that any was filed in their behalf. *Wolverton* v. *Nichols,* 119 U. S. 485, 7 Sup. Ct. 289; *Doe* v. *Mining Co.,* 43 Fed. 219.

"The statute makes such a proceeding regularly prosecuted, when the period of notice is completed without the presentation of an adverse claim, absolutely conclusive against adverse claims. The proceeding is in the nature of a proceeding *in rem,* and is binding upon all the world, so far as any unrepresented adverse claim is concerned." *Hamilton* v. *Mining Co.,* 13 Sawy. 113, 33 Fed. 562.

"The publication and posting of notice of the application for patent is a process which brings all adverse claimants in

court,—a summons to all persons whose interests may be affected by the issuance of a patent to the tract applied for to appear and file their adverse claims." Lindl. Mines, § 713, and cases cited.

"It is so well established, as to be axiomatic, that a failure to file an adverse claim within the time fixed by law operates as a waiver of all rights which were the proper subject of such a claim." Id. § 742, note 1.

We find no valid reason for granting a rehearing. It therefore is denied.

PAINE v. GRIFFITHS ET AL.

(86 Federal 452. Circuit Court of Appeals, Third Circuit. April 4, 1898.)

[1]Conditional grant. A grant of minerals, whether construed as a deed or as a lease, the consideration of which is the obligation to prospect and develop the minerals, is a conditional grant and the property conveyed reverts to the grantor upon abandonment of work.

Transfers by a grantee for speculative purposes will not negative the presumption of abandonment arising from failure to do any work.

[2]Abandonment when conclusively presumed. Abandonment is not a question of intention merely, in the face of absolute neglect of what is required of the grantee, for an indefinite length of time.

In Error to the Circuit Court of the United States for the Western District of Pennsylvania.

A. LEO WEIL, for plaintiff in error.

M. F. ELLIOTT, for defendants in error.

Before DALLAS, Circuit Judge, and BUTLER and BRADFORD, District Judges.

[1]Construction of sale of land with condition or covenant to prospect for mineral value. *Barnard* v. *Keane Co.* 17 M. R. 94.

Sale of land and perpetual right to mine, reserving royalty on the coal, held to carry no exclusive right to mine. *Jennings Co.* v. *Beale*, 158 Pa. 283; 27 Atl. 948.

Distinction between lease and deed of sale stated. *Genet* v. *Delaware Co.* 37 N. Y. Sup. 1087; 43 Id. 589.

Grant subject to condition of discovering mines construed in connection with the words "together with." *Woodside* v. *Ciceroni*, 93 Fed. 1.

Grant of minerals construed as optional lease. *Brooks* v. *Kunkle*, 24 Ind. App. 624; 57 N. E. 260. *Genet* v. *Delaware Co.* 163 N. Y. 173; 57 N. E. 297.

Construction of deed conveying "all coal" but limiting the right to remove it to a certain date. *Butler* v. *McGorrisk*, 114 Fed. 300.

[2]A forfeiture takes place when a man neglects to work without regard to intention. *McKay* v. *McDougall*, 25 Mont. 258; 64 Pac. 669. *Stage* v. *Boyer*, 19 M. R. 210.

BUTLER, District Judge. The plaintiff's title rests upon the following agreement:

"Made and concluded this 3d day of May in the year of our Lord one thousand eight hundred and sixty-seven. Between George Whitesell, of Hampton township in the county of Allegheny in the state of Pennsylvania, party of the first part and Almon Rainey and O. D. Paine of Youngstown, in the county of Mahoning in the state of Ohio, party of the second part, as follows:

"The said party of the first part for the consideration of one dollar to him in hand paid as well as the agreements hereinafter mentioned does hereby bargain, sell and convey to the party of the second part, his heirs and assigns, all the mineral, coal, iron ore and other minerals and all rock or petroleum oil and salines in, upon and under the farm or tract of land in the township of Hampton in the county of Allegheny in the state of Pennsylvania bounded and described as follows:

"On the north by land of A. Watson & Mury heirs, on the east by land of Mury heirs, on the south by land of A. Watson, on the west by land of Joseph Moon. Containing two hundred and seventy (270) acres of land, granting to the party of the second part or his assigns, as well as his and their laborers and workmen, the exclusive right to enter upon said lands at any time hereafter and search for coal, iron ore and all other minerals, oils and salines and when found, to remove the same from said lands, together with all the rights and privileges incident to the mining and securing said coal, iron ore and other minerals, oils and salines including the right of ingress and egress and to dig, mine, explore and occupy with such construction and buildings as may be necessary and useful for the full enjoyment of the advantages of said coal, iron ore and other minerals, oils and salines and with the refuse from said mines and also the right to mine and remove the coal, iron ore and other minerals, oils and salines from other lands, through, over or under said lands.

"And the party of the second part agrees by himself, his assigns and workmen to make search for coal, iron ore and other minerals, oils and salines upon the lands above described, and should he find coal, iron ore or other minerals or oils or salines in said lands and other lands of sufficient thickness, quantity and quality to justify him, the party of the second part, in his opinion to open and work said mines or oils or salines then he or his representatives or assigns shall pay to the party of the first part, his heirs or assigns, within three years after the completion of a railroad built in connection with any leading railroad by which said minerals or oils can be taken to any large markets the sum of twenty dollars a year, and the party of the second part shall have the right to abandon

said lands and mining at any time and remove all his buildings and fixtures from said lands. And it is further agreed upon by the parties to this contract that if the party of the second part shall fail to construct or cause to be constructed the railroad herein contemplated within five years from the date of this contract the party of the second part shall pay to the party of the first part the above-named sum of twenty dollars a year thereafter until said railroad is completed or mining is commenced on said premises. And a further consideration of this contract is to induce capitalists to develop the mineral wealth of this section in the county of Allegheny and state of Pennsylvania. And the said party of the second part by himself or assigns agrees to pay to the party of the first part, his heirs, legal representatives, or assigns the sum of ten (10) cents for each ton (of 2,240 pounds) of screen coal mined and removed from said lands herein described, and the price or rent of the iron ore and limestone mined and removed from said lands for such gross ton of 2,240 pounds shall be ten cents for screened or cleaned ore and limestone and the price or rent for rock or petroleum oil shall be ———, and saline ———. But it is understood and agreed that any advance payments that shall be made to the party of the first part are to apply to the payment of rents of coal, iron ore or other minerals or oils first named thereafter, the payment of rent per ton on coal, iron ore and other minerals, oils and salines mined and removed shall be made half yearly and all payments required by this agreement shall be made and accepted in bankable funds of the state of Pennsylvania. It is mutually understood by the parties that the coal and ore under any dwelling house or other permanent buildings now upon the premises shall not be mined out and as little injury to the surface of said land shall be done as possible in the mining, removing and transportation of said coal and ore, oils and all other minerals as herein contemplated.

"It is further understood and agreed upon as a part of this contract that the party of the first part hereby grants and gives to the party of the second part all the land necessary in the above-described premises for location, construction and occupancy of a public railroad as above contemplated together with lateral branches. It is also mutually understood that the stipulation herein contained shall apply to and bind the heirs, executors, administrators and assigns of the parties respectively.

"In witness whereof the parties have hereunto set their hands and seals, the day and year first above written.

"George Whitesell, [Seal.]
"Almon Rainey, [Seal.]
"O. D. Paine. [Seal.]

"Signed, sealed and delivered in the presence of
"Robert Hardy.
"Martha A. Orr."

The main question is: how should this contract be interpreted? The court below, without determining whether it created a grant of the minerals, or a lease of them, held that the provision for abandonment related to the entire interest transferred to Rainey and Paine, and instructed the jury to find for the defendant if it appeared that Rainey and Paine and their assigns, had abandoned the property. To this view of the contract, and the manner of submitting the question of abandonment, the plaintiffs excepted.

It may not be important to determine whether the contract constituted a grant, or merely a lease; as the result would probably be the same in either case, under the laws of Pennsylvania. If a lease, it would not be terminable at the will of the lessor, as the defendant urges. *Lewis* v. *Effinger,* 30 Pa. St. 281; Id., 32 Pa. St. 367. It seems clear, however, that the interest transferred was a grant of the minerals; not absolute, but conditional. The grantees were expressly authorized to abandon the property and thus terminate their obligations, as well as their interest. The provision was not inserted for their benefit alone, but as well for the grantor's. This is too manifest to justify discussion. His object was the development and utilization of his land. If, therefore, the grantees abandoned the property the grantor was to be remitted to his former condition. The plaintiff's interpretation of the clause, and of the agreement generally, is inadmissible. It divorces the grant from the obligations on which it rests, and thus makes the former absolute, and the latter independent covenants; thus allowing the grantees to retain the minerals while disregarding and abandoning the obligations on which the right to them depends. The terms of the clause itself—which are that "the party of the second part shall have the right to abandon the said lands and mining at any time and remove buildings and fixtures"—forbids this interpretation. If it were possible to construe the language so as to make it relate to the mining operations alone, and thus allow

the grantees to withdraw from them and still retain the minerals, the court would be reluctant to do it, and thus defeat the manifest object of the grantor. But it is not possible. The term "land" accurately describes the mineral right granted. *Kier* v. *Peterson,* 41 Pa. St. 357; *Union Petroleum Co.* v. *Bliven Petroleum Co.,* 72 Pa. St. 173; *Glasgow* v. *Gas Co.,* 152 Pa. St. 148 [25 Atl. 232]. It is not merely the mining operations therefore, that are subject to abandonment, but the mining right as well. Consequently if the grantees elect to take advantage of the clause their act terminates not only their right to operate mines upon the premises, but all other rights conferred by the contract. The court's interpretation cannot, therefore, be complained of.

Is its submission of the question of abandonment liable to just criticism? It is unnecessary to notice the numerous assignments of error separately. Those relating to the construction of the contract, and the answer to points touching that subject, are covered by what has been said. The first, fifth, sixth, seventh, twelfth and fifteenth, relate to the question now under consideration. A careful examination of these assignments has not convinced us that any error was committed, calculated to prejudice the defendant. It is easy in most cases to render a charge subject to adverse criticism by cutting it in pieces and considering the parts separately. The question, however, is whether the charge, taken as a whole, and as the jury should have understood it, was unjust to the plaintiff. Here the inquiry whether the evidence proves the alleged abandonment, was fairly submitted, and the jury's attention called to the main features of the testimony on which its decision rests. It is probable the court would have been justified in saying that if the jury should find that the grantees and their assigns did, substantially, nothing under the agreement, for the period which elapsed between its date and the subsequent lease to Griffiths—more than 20 years—it should find an abandonment. While the question is one of in-

tention mainly, its decision does not depend upon an intention to abandon or retain the mineral right alone, divorced from the obligations which adhere to it under the contract, but intention to abandon the contemplated enterprise. Evidence, therefore of transfer, or attempts to transfer, this right, as matter of mere speculation, was entitled to no weight in the presence of proof that nothing further was done or intended to be done; and that the obligations on which the grant rests were disregarded and abandoned. Surely the transaction between Griffiths and Allen was entitled to no consideration. More than 20 years had then elapsed since the grant to Rainey and Paine, and nothing whatever, of consequence, had been done under the agreement. Griffiths had recently obtained an oil right in the land, and was about to commence work. Hearing accidentally of this agreement he went to Allen, who held a supposed interest under it, and paid him something, to avoid danger thereafter. The court referred to the claim of Allen as a mere cloud on Griffiths' title. Certainly it was no more. The evidence of abandonment at that time was ample to justify and require a jury to find the fact. Neither Allen, nor anybody else claiming under the agreement, could breathe new life into the grant; it was dead and could not be resurrected. Nevertheless he was in a position to demand something, and Griffiths in a situation that justified the payment of something, to insure peace. The plaintiffs say, however, the court was inconsistent with itself, that while undertaking to submit the question it decided it. We do not think the criticism is just when the entire charge is considered. The court doubtless meant to be understood as saying that Griffiths regarded Allen's claim as a mere cloud. If the court had said this transaction is of no consequence, in case abandonment had previously occurred, that Allen's claim under such circumstances, was a mere cloud on Griffiths' title, the statement would have been strictly accurate. The expressions complained of, however, could do no harm; not only because they

were unlikely to be understood as the plaintiffs construe them, but also because the facts on which the question of abandonment depends are free from question, and fully warranted the court in leading the jury to the conclusion reached, if they did not even call for binding instruction, as before indicated. In *Atchison* v. *McCulloch,* 5 Watts, 13, the court said:

> "Abandonment is not always a question of intention exclusively for the jury, without a controlling instruction from the court. Under a certain uncontradicted state of facts the law will pronounce the conduct of a party to be an abandonment, whatever may have been his intention."

For these reasons the judgment must be affirmed.

THOMAS TRAYES ET AL v. WILLIAM H. JOHNS.

(11 Colorado Appeals 219; 52 Pac. 1113. Court of Appeals. April 11, 1898.)

[1]**An agreement for partnership must have a consideration; and the mere naked promise of one person that another shall share in the profits of his enterprise, where the other furnishes or does nothing towards the common enterprise, is void.**

Appeal from District Court, Pitkin County.

Suit by William H. Johns against Thomas Trayes and others. Judgment for plaintiff. Defendants appeal. Reversed.

CHARLES R. BELL and H. L. MCNAIR, for appellants.

No appearance for appellee.

WILSON, J. This was a suit in equity, based upon an alleged agreement for partnership in a lease of mining property. The agreement on which the action is founded is thus set forth in the plaintiff's complaint:

"That on or about the 1st day of February, A. D. 1895, the plaintiff and defendants John F. Trayes and Thomas Trayes entered into an agreement whereby they were to obtain leases upon some of the blocks to be leased by the Durant Mining Company and the Compromise Mining Company, on Aspen Mountain, in the Roaring Fork mining district, and

Partnership may exist without express agreement. *Ferris* v. *Baker*, 127 Cal. 520; 59 Pac. 937.

A lease held in the name of one partner may be shown by parol to have become partnership property. *Brown* v. *Beecher*, 120 Pa. 590; 15 Atl. 608.

Agreement between mine owners and mill men held to constitute no partnership. *Vietti* v. *Nesbitt*, 18 M. R. 247.

Ownership without working does not create partnership. *Hartney* v. *Gosling*, (Wyo.) 68 Pac. 1118.

by the terms of said agreement, the said defendants, John F. Trayes and Thomas Trayes, and this plaintiff, were to be equal owners in and to whatever leases they or either of them should obtain, or any interest that either of them should acquire."

Plaintiff further alleged that, about the 15th day of February following, each of said defendants did obtain an undivided one-tenth interest in and to five blocks of ground upon the mining claims of the Durant and Compromise Mining Companies, and that, in pursuance of said contract, plaintiff was the owner of one-third of said interests so acquired. The prayer of the complaint was that an accounting be had between the said defendants and the plaintiff; that he have judgment for whatever should be found due to him; and that plaintiff also be decreed to be the owner of one-third of the interests so owned by said defendants. He also prayed an injunction against the First National Bank of Aspen, which was joined as a party defendant, restraining it from paying out to the defendants certain sums of money alleged to be on deposit with it, in their name. The injunction was granted as prayed for. The bank answered, disclaiming any interest in the matters in controversy. The other defendants, the Trayes brothers, answered, specifically denying each allegation of the complaint, setting up the manner in which they secured their interest in the leases in question, the consideration paid therefor, and alleging that plaintiff had never at any time paid or offered to pay any proportion of the expenses of obtaining or prosecuting said leases. Upon trial, the court made no specific findings of fact, but simply found in favor of the application of plaintiff for an accounting, ordered an accounting, and appointed a referee to take the same. The report of the referee was confirmed with some slight modification, and judgment was thereupon rendered in favor of plaintiff, and against defendants, for the sum of money found to be due to him as owner of the one-third in-

terest in the parts of the leases held by the Trayes brothers, defendants.

In the view we take of the case, it will not be necessary to discuss the question raised by defendants as to whether a trust in a lease of real estate can be created by parol, nor as to whether the complaint sufficiently pleaded an agreement for partnership. Nor will it be essential to consider or decide whether an action of this kind can be maintained upon an unexecuted contract for partnership, or whether the remedy of the party complaining is an action at law for damages. The proceedings in the cause up to final judgment were upon the theory that an agreement for partnership was pleaded. We shall treat the cause, therefore, upon this theory, and upon the assumption most favorable to plaintiff that this action could be maintained under the facts and circumstances of this case. It appears from the evidence undisputed that about February 8, 1895, defendant John F. Trayes secured a lease for a block of ground of the mining companies mentioned in the complaint. It seems that these leases were let by competitive bidding, and that this defendant was the highest bidder for this block. His bid was the sum of $500 as a bonus, one-third to be paid in cash upon the execution of the lease, and the remainder from the proceeds derived from working under the lease. A written lease was executed, and he paid the stipulated cash part of the bonus. At the same time, four other blocks of ground were leased to four separate individuals, upon varying terms, not material to the determination of this cause. It then appears that these four and defendant John F. Trayes concluded that it would be for the best interests of all to consolidate these five separate leases, working them under the same management, and, in order to secure the necessary capital, that five other men should be taken in as partners. This was agreed to, and, with the consent of the mining companies, the arrangement was consummated. One of the five men who thus acquired

an interest by the payment of a proportionate share of the cash bonus exacted, and by putting up his share of such money as might be required for the working of the property, was defendant Thomas Trayes, the brother of John F. Operations were then commenced under the consolidated leases. For several months no profits whatever were realized. In October following, plaintiff commenced this suit. The evidence adduced in favor of plaintiff to sustain his claim that there was an agreement for partnership is very vague and weak. It is based upon a statement which he claims these defendants made to him while visiting him at his house. He testified that they called to see him, and had some conversation with him in reference to some blocks of ground which it was said the Durant company intended to lease, and that they wished him to go with them to the mine and look at these blocks, he having worked in that vicinity. He replied that it was impossible for him to go on account of being sick, and thereupon "they made the remark, 'Well, never mind, Bill, whatever we get we will share alike.' They not only said it once, but half a dozen times, and on different evenings that they called at my house." The defendants each deny making any such remark in reference to the Durant proposed leases. They claim that they had at some time previous had some conversation with him about taking a lease upon some ground of another company, and that a bid had been put in therefor, but it had been unsuccessful. The wife and daughter of the plaintiff, however, to some extent corroborated the testimony of plaintiff. They claimed to have heard substantially such a remark as that testified to by him, and that their understanding was it was made in reference to leases or a lease of Durant ground. Conceding that such a remark was made, the whole testimony with reference to what lease or what ground was being considered is exceedingly vague, indefinite, and uncertain. We will assume, however, that it was made with reference to the identical

blocks of Durant ground in a lease in which the defendants afterwards secured an interest. It is not pretended that during the several months which elapsed from the time this lease was secured, until the commencement of this suit, that the plaintiff ever offered to pay to defendants his proportion, or any proportion, of the amount which they had been required to pay to secure the lease, or any part of the expenses of operation under the lease. It is not shown or pretended that he ever made any demand upon the defendants, or either of them, to be taken in or treated as a partner. It is not shown that he even during this time claimed to them that he was entitled to an interest. It is true he says that upon one occasion, several months after the lease was secured, he remarked to Thomas Trayes that he thought he had not been treated fairly by the brothers in reference to the leasing, and asked them when they were going to make an accounting with him. This, however, was in the following May, after plaintiff and the Trayes brothers had endeavored to secure a lease upon another block of the Durant property, when plaintiff had put in a bid, but did not secure the lease. Admitting, however, that the remark was in reference to the identical lease in question, it was the only thing said by him in the nature of a complaint. He made no effort to assert his rights, and no demand whatever upon the defendants. These facts are not material to the point which is decisive of this case, but we mention them to show what an utter want of equity there is in plaintiff's contention as viewed in any aspect. A court of equity, if it attempts at all to enforce rights based upon so slight a foundation as those claimed by plaintiff, will certainly not do so unless they are asserted in proper time, and with proper diligence. A failure to assert them furnishes the strongest proof of their non-existence or abandonment.

The fact, however, that the alleged agreement was confessedly without consideration, settles this case. An agreement for partnership, like any other contract, must be founded on

a consideration of mutual promises or contributions of some character. A naked promise by one person that another shall share in the profits of his enterprise, where the other furnishes no capital or labor or anything towards the promotion of the common enterprise, is void. In this case the plaintiff seeks to reap the benefits of the labors and expenditures of these defendants, without pretending that he ever furnished one cent, or ever performed any labor, or did anything whatever which tended to the securing of the lease or its operation. He would certainly stand upon better equitable, if not legal, ground if it were shown that, within any reasonable time after the lease was secured, he had offered to pay some portion of the money necessarily advanced, or to perform some labor in the operations under the lease.

Neither was there any claim or attempted proof of any act or transaction jointly undertaken by plaintiff and defendants connected with or in furtherance of the securing of the lease or of any operations under it. If this had been shown, however slight the act, it might have been sufficient to bring the case within the familiar rule that, where a contract is subject to different interpretations, that acted upon by the parties to it will be presumed to be the proper interpretation.

To enforce such a contract as this, where there is no mutuality between the parties, and where no consideration whatever has been paid, where one party furnishes all the money and all the labor, and the only obligation or duty resting on the other is to share in the profits, would be the taking from a person of his property arbitrarily, without any right, reason, or law. The alleged contract, having been without consideration, cannot be enforced either at law or in equity. Bates, Partn. § 2; Pars. Partn. § 6; *Mitchell* v. *O'Neale,* 4 Nev. 514.

It is therefore ordered that the judgment be reversed, and the cause remanded, with instructions to dissolve the injunction, and dismiss the suit.

Reversed.

R. M. MALONEY v. FRANK M. LOVE.

(11 Colorado Appeals 288; 52 Pac. 1029. Court of Appeals. April 11, 1898.)

[1]The words "net proceeds" when not qualified by any other words in the contract mean "what remains of the gross proceeds after all expense and loss incurred in realizing them are deducted."

[2]"Non-assessable" interest. "In the phraseology of miners a non-assessable interest in a lease upon a mining claim is an interest against which no expense is chargeable."

Appeal from District Court, El Paso County.

Action by Frank M. Love against R. M. Maloney. Judgment for plaintiff. Defendant appeals. Affirmed.

BICKSLER & MCLEAN and FRANK MCLAUGHLIN, for appellant.

JOHN W. SLEEPER and GEORGE M. IRWIN, for appellee.

[1]Net proceeds defined. *Yank* v. *Bordeaux*, 23 Mont. 205; 58 Pac. 42.

When lessee agrees to pay to lessor one-third the profits the word "profits" is not equivalent to "income" but means the net amount realized after deducting expenses. *Poterie Gas Co.* v. *Poterie*, 179 Pa. 68; 36 Atl. 232.

[2]Profits do not exist until all expenses are paid. Monthly rests on settlements are not favored. Holders of non-assessable interest charged with expenses to the extent of the mill returns. *Taylor* v. *Thomas*, (Colo.) 71 Pac. 381; 22 M. R. —.

The decision in the *Taylor case* above cited is not consistent with the text case and being later and decided by a reviewing court, is the controlling authority. The true definition of a non-assessable interest is undoubtedly that adopted in the *Taylor case* where the non-assessable interest is charged with expenses as far as the mill returns pay them. "Non-assessable" means that neither the interest or its owner is liable for any shortage beyond what the mine produces.

THOMSON, P. J. Complaint by Frank M. Love against R. M. Maloney to recover a balance alleged to be due on royalties reserved in a lease of mining premises entered into between the plaintiff and the defendant's assignor.

The answer admitted the lease and the assignment to the defendant, but denied indebtedness to the plaintiff. Proceeding further the answer alleged a large outlay by the defendant in the development of the property and the extraction of ore, with a proportion of which, amounting to more than the sum claimed in the complaint, he averred the plaintiff was chargeable, and prayed judgment for the excess.

At the trial, the facts were not in dispute. The decision turned below, and it turns here, upon the construction to be given to the following covenant of the lessee, as contained in the contract of lease: "To deliver to said lessors, as royalty, sixteen and one-half (16½) per cent. on all net proceeds from all smelter and freight charges and mill returns on all ore of the value of fifty dollars ($50.00) per ton or less; twenty-one and one-half (21½) per cent. on all ore over the value of fifty dollars ($50.00), and not exceeding one hundred dollars ($100.00), and twenty-seven and one-half (27½) per cent. on all ore over the value of one hundred dollars ($100.00) per ton. It is also further agreed by and between the parties of the second part to deliver to the parties of the first part an undivided one-fourth non-assessable interest to the within lease, free from all expense whatever to parties of the first part, said one-fourth interest being the net proceeds from said ore taken from said lease." It is the meaning of the second clause of this covenant which is specially in controversy. Selecting the words "said one-fourth interest being the net proceeds from said ore taken from said lease," as a foundation for their argument, defendant's counsel maintain that the plaintiff is chargeable with his share of the cost of development and mining and that the defendant is entitled to a set-off or recoupment of such share against the balance of

royalty due the plaintiff, and for judgment in such sum as the plaintiff's proportion of the expense may exceed the balance owing to him. We are referred to a number of authorities in which a definition is given to the words "net proceeds." We need not specially notice these authorities, because we are in perfect agreement with them. The words "net proceeds," as used in a contract, where their signification is not qualified or restricted by other words in the same contract, mean what remains of the gross proceeds after all expense and loss incurred in realizing them are deducted.

The defendant had paid the plaintiff a considerable sum in pursuance of the provisions of the lease, and, adopting the most comprehensive definition of "net proceeds," he seeks to wipe out the unpaid residue, and to recover back, out of what he had paid, an amount sufficient to make him whole, so far as the share of his outlay for which he regards the plaintiff as liable is concerned. What his rights in the premises really are must be determined, not by isolating certain words from the connection in which they occur, and putting an interpretation upon them without regard to their relative situation, but by considering all the language of which the words form a part. After providing for the payment of specified royalties to the lessor, the contract reserves to him an undivided one-fourth interest in the lease, and described the interest as "non-assessable." This is a term used by mining men, and has a definite and well-understood meaning. In the phraseology of miners, a non-assessable interest in a lease upon a mining claim is an interest against which no expense is chargeable. The holder incurs no liability by reason of any work done upon the claim. The cost of sinking shafts, running drifts, and extracting ore must be borne by the other interests. But the contract proceeds to define the one-fourth interest in question as being "net proceeds," and upon these words counsel for the defendant plant themselves. If the

words as they occur mean what counsel contend they do, then the interest is chargeable with its share of all money expended upon the mine. In other words, the interest is assessable; and the lessee has covenanted to give to the lessor a non-assessable interest which is not non-assessable,—a *reductio ad absurdum*. What meaning, then, did the parties intend to convey by "net proceeds"? The words of themselves imply a deduction of something from gross proceeds. It is manifest that in whatever deduction the parties contemplated, it was not intended to include work upon the mine, because the interest was expressly exempted from liability on account of such work.

Having determined, from the language employed in the second clause of the covenant, what the parties did not mean by "net proceeds," by referring to the first clause we shall have no difficulty in finding what they did mean, because they have there given expression to the sense in which the words are to be understood. They have confined the deductions to be made from the gross proceeds, in order that the result may be net proceeds, within certain limits. They say that the royalties shall be paid "on the net proceeds from all smelter and freight charges and mill returns." These words are not well put together, but every miner and every person familiar with transactions involving leases of mining property knows exactly what they mean. They mean that freight charges and charges for treatment are to come out of the gross mill or smelter values, and what is left is the net proceeds.

It being evident from the language of the second clause that the parties did not intend any allowance to the lessee on account of the cost of development and mining, and it being equally evident that they intended a deduction of something to make the proceeds net, as they have given a definition of the words "net proceeds" in the first clause, and as that clause and the other are both parts of the same contract, and are to

be construed together, we must presume that they intended their definition of the words as used in the first clause to apply to the same words as used in the second.

Whether we look at the two clauses together, or look at them separately, the work which the defendant claims he did was not chargeable to the plaintiff, or to his interest in the lease, and gave the defendant no right of action against him.

Let the judgment be affirmed.

Affirmed.

AMOS STEELSMITH v. JAMES GARTLAN ET AL.

(45 West Virginia 27; 20 S. E. 978. Supreme Court of Appeals. April 16, 1898.)

'Oil lease vests no present title. A lease for the purpose of operating for oil and gas for the period of five years, and so much longer as oil or gas is found in paying quantities, on no other consideration than prospective oil royalty and gas rental, vests no present title in the lessee except the mere right of exploration; but the title thereto, both as to the period of five years and the time thereafter, remains inchoate and contingent on the finding, under the explorations provided for in such lease, oil and gas in paying quantities.

The completion of a non-productive well, though at great expense, vests no title in the lessee.

fo Provision for second well. Such lease must be construed as a whole, and, if there is no provision therein contained requiring the boring of another well after the first unsuccessful attempt is completed and abandoned, the lease becomes invalid, and of no binding force as to any of its provisions.

(Syllabus by the Court.)

Appeal from Circuit Court, Ritchie County; Thomas P. Jacobs, Judge.

Bill by Amos Steelsmith against James Gartlan and others. Decree for defendants, and plaintiff appeals. Reversed.

V. B. ARCHER, for appellant.

VAN WINKLE & AMBLER and W. W. ARNETT, for appellees.

[1]*McNish* v. *Stone*, 17 M. R. 22. *Florence Co.* v. *Orman*, (Colo. App.) 73 Pac. 628.

Calhoon v. *Neely*, 201 Pa. 97; 21 M. R. —. *Huggins* v. *Daley*, 99 Fed. 606; 20 M. R. —. *Parish Fork Co.* v. *Bridgewater* Co. 51 W. Va. 583; 22 M. R. —.

Lessee has no title to oil until it is pumped. *Wagner* v. *Mallory*, 169 N. Y. 501; 62 N. E. 584.

DENT, J. On the 30th day of August, 1889, Knotts and Garber obtained a lease for oil purposes covering the land in controversy in this suit, without other consideration than one-eighth of the oil produced and $200 per annum for each paying gas well, with the stipulation that the lessees should complete a well within one year from the date of the lease; and the failure to do so rendered the lease null and void unless the lessees should pay 25 cents per acre from and after the time above specified for the completion of said well, when such payment should operate to extend the time for five years. This lease David McGregor considered forfeited, and refused to accept the rent therefor, or continue the same in force. If the conditions had been performed by payment of rent accepted by the lessor, it would have expired the 30 of August, 1895, no well having been drilled by Knotts and Garber. On the 10th day of February, 1895, Matilda McGregor, as devisee and executor of David McGregor, then deceased, executed the following lease to James Gartlan, to wit:

"An agreement made the 11th day of February, A. D. 1895, between Matilda McGregor, of the district of Grant, county of Ritchie, and state of West Virginia, lessor, and James Gartlan, of Pittsburg, Pennsylvania, lessee, witnesseth: That the lessor in consideration of one dollar, the receipt of which is hereby acknowledged, and of other valuable considerations, do hereby demise and grant unto the lessee, his heirs or assigns, all the oil and gas in and under the following described tract of land, and also the said tract of land, for the purpose and with the exclusive right of operating thereof for said gas and oil, together with the right of way, the right to lay pipes over and use water from said premises, and also the right to remove at any time all property placed thereon by the lessee, which tract of land is situated in the district of Grant, county of Ritchie, and state of West Virginia, and is bounded and described as follows, to wit: North by lands of Andrew Douglass and B. & O. Railroad, east by

lands of Andrew Douglass and Jacob Hatfield, south by lands of A. M. Douglass and others, west by lands of Andy Hall and others, containing one hundred and twenty-two acres, more or less; to have and to hold the same unto the lessee, his heirs and assigns, for the term and period of five years from the date hereof, and so much longer as oil or gas is found in paying quantities thereon, yielding and paying to the lessor the one-eighth (1/8) part of all the oil produced and saved from the premises, delivered free of expense into tanks or pipe lines to the lessor's credit; and, should any well produce gas in sufficient quantities to justify marketing, the lessor shall be paid at the rate of two hundred dollars per year for such well so long as the gas therefrom is sold, lessor to have gas for domestic use on the premises free, she making her own connections. Second party covenants and agrees to locate all wells so as to interfere as little as possible with the cultivated portion of the farm, and to pay all damages to growing crops by reason of operations. No well to be drilled on this lease within five hundred feet of the buildings as now located, without the consent of both parties. In case no well shall be completed on the above-described premises within one month from the date hereof, this lease shall become null and void, and without any further effect whatever, unless the lessee shall pay for further delay at the rate of fifty dollars per month in advance thereafter until a well shall be completed. Such payment may be made in hand or by deposit to the lessor's credit in Second National Bank of Parkersburg. If above-mentioned well produces 20 barrels of oil per day for the first 30 days after completion, the lessee agrees to drill 2 more wells on the above-mentioned premises within a year from the completion of the above-mentioned well; provided that the second well drilled produces 20 barrels of oil per day for the first 30 days after completion. If second well does not produce 20 barrels per day for first 30 days after completion, then it shall be optional with the lessee to drill the

third well. All wells shall be served with the best known means to produce the greatest quantity of oil. A failure to comply with any of the conditions of this lease shall render the same null and void, and of no effect. It is agreed further that second party shall have the right at any time to surrender this lease to first party for cancellation, after which all payments and liabilities to accrue under and by virtue of its terms shall cease and determine, and the lease become absolutely null and void. It is understood that all the terms and conditions between the parties hereto shall extend and apply to their respective heirs, executors, administrators, and assigns. In witness whereof, the said parties have hereunto set their hands and seals the day and year first above written. Matilda McGregor. [Seal.] Matilda McGregor, Executrix. [Seal.] ——— ———. [Seal.] James Gartlan. [Seal.]

"Sealed and delivered in presence of ——— ———."

Gartlan, with the assistance of others, put down a test hole about 1,800 feet by April following, but, finding neither gas nor oil in paying quantities, removed the derrick and tools, pulled the casing, and plugged the hole, and left the premises. At the same time he surrendered a number of other leases, but through his agent, Parks, asked permission of Mrs. McGregor to retain the lease under consideration for a short time. During the time the test was made the lessee paid Mrs. McGregor three monthly payments of $50 dollars each, as stipulated, because of delay in completion of the first well. He then discontinued such payments, and entirely abandoned and ceased further operations for oil and gas on the premises. Mrs. McGregor, according to her testimony, before he stopped operations insisted that he should go deeper, and make a more thorough test, even being willing to part with a further portion of her interest in the result, if successful, if he would consent to do so. But, claiming that he had made a full test, he refused her request. Gartlan had taken a man by the name of Hays in with him. On the 17th of September, 1896, Mrs.

McGregor wrote them the following letter: "Cairo, W. Va., Sept. 17, 1896. Mess. Hays and Gartlan—Gentlemen: As you have abandoned the lease given you by me on our farm, and shown by your actions that you did not intend to operate it any further, I would ask you kindly to send it to me with a release deed, as I am now ready to lease again. Please give this your earliest attention, and oblige, M. McGregor." Getting no reply from this, she wrote another letter to a Mr. Parks, who had acted as agent for Gartlan, to wit: "Cairo, W. Va., Sep. 28, 1896. Mr. Parks—Sir: I wrote a letter some time ago to Mr. Gartlan and your uncle, asking them kindly to send me the lease that they have been holding on my place. You know you only asked me to hold it for a short time, and now I think I have waited a sufficient time for them to make up their minds on what they intended to do; and they have shown, by abandoning the lease, that they did not intend to operate it, so I think they ought to send me the lease at once, so I could be making something out of it, as life is too short for me to let that amount of land lie idle, and not be making even the taxes off it. Now, please take this in consideration, and act on this at once, as you know I mean business. And I understand you have Mr. Gartlan's place in the Co. now. I don't know what position Gartlan holds in the Co. at this time. Now, do please give this your attention at once, as I am going to lease. I am going to get something out of it or nothing, as the case may be. That remains to be seen. I may get a 19½ barrel well next time and may be another dry hole. I can't tell. Now, you understand me. I am going to lease at once if I don't hear from you by return mail. Yours, in haste, your friend, M. McGregor." To this she also received no reply, when she wrote a third letter, as follows, to wit: "Cairo, W. Va., Oct. 3, 1896. Mr. Parks—Sir: I wrote you on the 28th Sept., asking for the lease that your Co. holds on my farm; asked you to answer me by return mail, and I think you have had sufficient time to write, and now I

am going to write you again, and now I want an answer by wire, as I have no time to wait for mails. Well, Mr. Gartlan was here since, and left again without doing anything. He still wants me to wait and see the Wilson and Church wells come in before he does anything, so that will develop the other two sides of the lease. I told him I was not willing to wait any longer; if he was going to do anything, now was the time to do it, while the excitement is up. I can lease now, and to a good advantage; but, if either of those wells should come in dry, it will give another black eye, and I could not lease it at all. So I think he is injuring me in holding this lease from me, and not going to work on it at once, and protecting the lines. If he is not willing to take a risk on it, I am not either. I told him if they wanted to hold it any longer they would have to pay me the back rental. I could have leased it long ago, and been getting more from it than the back rental is worth; but I feel conscientious in the matter, and did not feel disposed to give them any trouble over it, as you know I could by putting a lease on top of theirs. It might cause a lawsuit, at least, and that would cost them more than the rental, so you see I want to treat them fairly, and do what is right by them, if they will let me do so; but, if they will not, then the only thing left for me to do is to look out for myself and the interest of this estate which I represent. Mr. Gartlan promised me he would see your uncle just as soon as he reached Pittsburg, and wire me what he was willing to do in the matter. Now, I will wait a sufficient time for his telegram, and also for yours, and, if I fail to get one, then I am going to lease at once. I have a good offer, and I am going to take it now while the excitement is up. I am offered more bonus than all the back rental comes to and the ¼ of the oil if there is any, and, if there is none, I will have the bonus anyway. Now you see my offer is a good one, and they can't blame me for taking it. And now for your lease, or the rental at once, as there is no time to wait, and you know I mean just what I say. So please

let me hear from you at once by wire, as the parties are waiting, and are willing to take it at their own risk. Please see your uncle at once, and wire me his conclusion. We have a telegram office here at Cairo. Yours, in haste, M. McGregor." Then, getting no satisfaction from the parties, either in the way of rentals or a new lease, on the 22d of October, 1896, she executed a new lease to Amos Steelsmith, the plaintiff and appellant in this case. In the meantime the parties claiming under the Gartlan lease moved some timbers on the land, as though in preparation for again boring, which Mrs. McGregor had cast off. Steelsmith, under his lease, proceeded forthwith to put down two wells, both coming in producers, when, before going to further expense, he filed his bill to cancel the Gartlan lease as a cloud on his title. The Gartlan lessees filed an answer in the nature of a cross bill, claiming the cancellation of Steelsmith's lease and the oil wells and their production, which was sustained by the court, and the relief sought granted. Knotts and Garber, also, to a supplemental and amended bill filed by Steelsmith, filed an answer in the nature of a cross bill, praying for affirmative relief, which was denied, and the bills were dismissed. Steelsmith appeals.

The question of importance presented to the court is as to whether the Gartlan lease was at an end at the time the Steelsmith lease was executed. The Gartlan lease is, with slight variance, in the usual form of such leases, and amounts to nothing more than the privilege of searching for oil and gas, and, if they be found in paying quantities, then vests an oil and gas tenancy in the lessee for the period of five years, or until exhaustion. Mrs. McGregor entered into the lease for the sole consideration of the prospective rents and royalties she would enjoy if the lessee, in diligent search therefor, should find oil and gas in paying quantities. If such lease failed to bind the lessee to diligent search for oil and gas, it was without consideration, binding on neither party, and

voidable, if not void, at the pleasure of either. *Cowan* v. *Iron Co.*, 83 Va. 547, 3 S. E. 120; *Petroleum Co.* v. *Coal, Coke & Mfg. Co.*, 89 Tenn. 381, 18 S. W. 65. The only provision in the lease binding the lessee to prosecute operation thereunder with diligence is as follows: "In case no well shall be completed within one month from the date hereof, this lease shall become null and void, and without any further effect whatever, unless the lessee shall pay for further delay at the rate of $50 per month in advance thereafter until a well shall be completed. * * * If above-mentioned well produces 20 barrels of oil per day for the first 30 days after completion, the lessee agrees to drill 2 more wells on the above-mentioned premises within one year from the date of the completion of the above-mentioned well, provided that the second well drilled produces 20 barrels of oil per day for the first 30 days after completion." There is no provision made for any further operations or payment of rent in case the first well, when completed, is non-productive. But the contract is at an end as to both parties as soon as such first well is abandoned as unsuccessful. "A vested title cannot ordinarily be lost by abandonment in a less time than is fixed by the statute of limitations, unless there is satisfactory proof of an intention to abandon. An oil lease stands on quite a different ground. The title is inchoate, and for the purpose of exploration only, until oil is found. If it is not found, no estate vests in the lessee, and his title, whatever it is, ends when the unsuccessful search is abandoned." *Venture Oil Co.* v. *Fretts*, 152 Pa. St. 451, 25 Atl. 732; *Plummer* v. *Iron Co.*, 160 Pa. St. 483, 28 Atl. 853; *Crawford* v. *Ritchey*, 43 W. Va. 252, 27 S. E. 220. This unsuccessful search and abandonment in this case applies to the first well, the only one the lessee stipulated to put down unless gas and oil were found in paying quantities. He could not, as he himself maintains, be compelled to put down another well; and, he not being bound, the lessor was not bound either, for the only con-

sideration left to her was the prospective oil royalties and gas rentals, which the lessee was in position to entirely defeat. Contracts unperformed optional as to one of the parties are optional as to both. Nor can there be a different conclusion if it is held that the lease, being for the purpose of operating for oil and gas, is subject to the implied precedent condition, according to the decisions of some of the states, notably North Carolina, that the lessee shall diligently prosecute the search and operation, for in such case the forfeiture would follow in a much less time than 18 months under the general clause, to wit: "A failure to comply with any of the conditions of this lease shall render the same null and void and of no effect," which necessarily applies to implied as well as express conditions. *Conrad* v. *Morehead,* 89 N. C. 31; *Maxwell* v. *Todd,* 112 N. C. 677, 16 S. E. 926; *Hawkins* v. *Pepper,* 117 N. C. 407, 23 S. E. 434. In the case of *Munroe* v. *Armstrong,* 96 Pa. St. 307, it was held that a cessation of active operations for 30 days forfeited a lease for oil purposes. The court says, on page 310: "An oil lease yields nothing to the landowner when not worked, and is an incumbrance on his land, tying his hands against selling or leasing to others; but, when idle, it costs the lessee nothing, and is valuable, or may prove valuable, if he can hold it waiting developments in its vicinity. If a well be productive, it is the interest of both the lessor and the lessee that it be continuously operated until its exhaustion, but, if dry, it is of no value. Holding on to a lease after ceasing search is often for purposes of speculation, the thing which a prudent landowner guards against. Forfeiture for non-development or delay is essential to private and public interests in relation to the use and alienation of property." In this case the condition was express, but the same rule applies with equal force to implied conditions. However, as before shown, the lessee having abandoned the only obligatory search provided for in his lease, it died on his hands without surrender, forfeiture or in-

tentional abandonment on his part, for he was without authority to make further explorations without the consent of and arrangement as to conditions with the lessor; in other words, without a new lease or extension of the old. Such leases are construed most strictly against the lessee and favorable to the lessor. *Bettman* v. *Harness,* 42 W. Va. 433, 26 S. E. 271. When a lease provides the mode, manner and character of search to be made, implications in regard thereto are excluded thereby as repugnant. And the demise for the purpose of operating for oil and gas for the period of five years is dependent on the discovery of oil and gas in the search provided for, and, if such search is unsuccessful, the demise fails therewith, as such discovery is a condition precedent to the continuance or vesting of the demise. The lessee's title being inchoate and contingent, both as to the five years limit and time thereafter, on the finding of oil and gas in paying quantities, did not become vested by reason of his putting down a non-productive well. This gave him no new or more extensive rights than he enjoyed before, but in fact destroyed all his rights under the lease. As is said in *Williamson* v. *Jones,* 43 W. Va. 562, 27 S. E. 411: "As an abortive well neither enhances the value nor yields anything to the true owner, he ought not to be charged with the cost thereof." The lessee would charge the expense of this abortive well as though it were a part of the consideration for this lease, when it was plainly evident that no such thing was ever had in contemplation by the parties, but this is a mere desperate afterthought to furnish a non-existent money consideration for the continuance of the lease. A dry hole, plugged up and abandoned, while expensive to the lessee, is no advantage, but an incumbrance, to the lessor. Then why should she pay for it by a non-operating and indefinite extension of the lease, to await the will and pleasure of the lessee, who claims the option to operate, abandon, surrender, or forfeit at his pleasure, while numerous others are clamoring for the privilege of diligent operation,

and offering a large bonus therefor? Such a holding would be unconscionable, and contrary to both right and justice. Mrs. McGregor's letters are given at length, to show how fully she understood her rights, and yet how willing, out of tender womanly sympathy, she was, in consideration of her lessee's fruitless expenditures, for which she was in no wise responsible, to give her lessee the first option of a new lease. This she was not required to do, and it was wholly gratuitous on her part, but she did not surrender or lose any of her rights thereby. The reason that the lessee gives for the abandonment of the well and the removal and sale of his tools and machinery, being that he was endeavoring to escape the process of the courts of this state to avoid unjust litigation, is not a legal or justifiable excuse. In the case of *Cryan* v. *Ridelsperger,* 7 Pa. Co. Ct. R. 473, an excuse that the lessee was unable to put down a well on account of the extremely cold weather was held insufficient to prevent a forfeiture, and yet it was much more reasonable than the one given by the lessee in the present case. No excuse, though ever so good, could relieve from the operation of a contract which was at an end by virtue of its own terms. The time the Garber and Knotts lease had to run, in any event, expired before the Steelsmith lease was executed, and hence they have no rights against the latter lease and cannot attack it in any manner for any reason. For the foregoing reasons the decree complained of is reversed, the lease known as the "Gartlan lease," bearing date the 11th day of February, 1895, is canceled, and annulled, and the injunction originally awarded in this case is made perpetual.

Reversed.

W. H. ROBERTS v. M. A. BETTMAN ET AL.

(45 West Virginia 143; 30 S. E. 95. Supreme Court of Appeals. April 22, 1898.)

[1]**Must pay rent or surrender.** A lease for oil and gas contemplates that the lessee have two years in which to bore a well, and provides "that the party of the second part shall pay to the party of the first part $100 per month in advance, until a well is completed, from the date of this lease, and a failure to complete such well, or to pay said rental when due, or within ten days thereafter, shall render this lease null and void, and can only be renewed by mutual consent, and no right of action shall, after such failure, accrue to either party on account of the breach of any covenant herein contained. * * * It is further agreed that the second party shall have the right at any time to surrender this lease to the party of the first part, and thereafter be fully discharged." The lessee bores no well, but holds the lease a number of months, and then surrenders it. *Held*, that the forfeiture provisions are for the lessor's benefit, and he can avail himself of them to declare a forfeiture for non-payment of rental or not, as he chooses, and, if he does not, can recover rental until the surrender of the lease. The lessee's mere failure to pay does not release him from obligation to pay. There was tacit consent to renew.

Right to remit excess. Where, under a lease, there may be recovery of monthly rental for a number of months, but not for all claimed by plaintiff, and he recovers a verdict for more than he is entitled to, he may release the amount beyond the proper number of months, and defendant cannot complain of it.

English, J., dissenting.

(Syllabus by the Court.)

Error to Circuit Court, Tyler County; Romeo H. Freer, Judge.

[1]For full note on the "null and void" clause in leases see *Bartley* v. *Phillips*, 18 M. R. 542.

Lease provided for penalty in case well not sunk. *Held* that lessees could not avoid sinking by paying the penalty. *Gibson* v. *Oliver*, 158 P. A. 277; 27 Atl. 961. And same as to rent. *Western Co.* v. *George*, 161 Pa. 47; 28 Atl. 1004.

Penalty for delay in sinking oil well cannot be attached to delay to work after sinking. *Williams* v. *Guffy*, 18 M. R. 478.

Action by W. H. Roberts against M. A. and D. Bettman on covenants in a lease. From a judgment for plaintiff, defendants bring error. Affirmed.

McCLURE & FORRER, for plaintiffs in error.

J. B. BLAIR and F. L. BLACKMARR, for defendant in error.

BRANNON, President. Roberts made two leases of two tracts of land to Boyle for oil and gas purposes, by which Boyle agreed to pay a certain share of oil for oil wells, and a certain money rent for gas wells, should producing wells be bored. The leases contain the clauses: "It is agreed that the party of the second part shall pay to the party of the first part $100 per month in advance until a well is completed from the date of this lease, and a failure to complete such well, or to pay said rental when due, or within ten days thereafter, shall render this lease null and void, and can only be renewed by mutual consent, and no right of action shall, after such failure, accrue to either party on account of the breach of any covenant herein contained. * * * It is further agreed that the second party shall have the right at any time to surrender this lease to the party of the first part, and thereafter be fully discharged." These leases were assigned by Boyle to M. A. and D. Bettman, partners. No well was

Lease construed as giving option to sink or pay rent. *Van Etten* v. *Kelly*, 66 Oh. St. 605; 22 M. R. —.

Lessee to sink gas well in 90 days or pay annual rent; the rent falls due at end of 15 months. *Evans* v. *Consumers Co.* (Ind.), 29 N. E. 398.

An oil lease will be construed where possible in favor of development and against idleness and delay. *Parish Fork Co.* v. *Bridgewater Co.* 51 W. Va. 583; 22 M. R. —. But not where such would be a forced construction of its terms. *Monfort* v. *Lanyon Co.* (Kans.), 72 Pac. 784.

bored under said leases. For some time the rental was paid, and then there was a failure to pay the rent for about nine months. For several months after the first failure to pay the monthly rental the Bettmans made no surrender of the lease, but finally did so. Roberts afterwards brought an action of covenant upon the leases for the purpose of recovering the unpaid monthly rentals. He recovered a verdict for the monthly rental of the whole period claimed by him. The court, upon a motion for a new trial, received a remittitur for that part of the verdict covering the monthly rentals after the surrender of the lease by the Bettmans, and gave judgment for the balance of the verdict,—that part of it which included rentals from the time when the Bettmans ceased to pay them up until the surrender. The Bettmans bring the case here by writ of error.

The question before us is, I think, one of great importance in this state. I surmise that there are many leases in this state containing similar clauses to those above given, and it is important that we give a fixed construction to them. The Bettmans advance the proposition that they could retain these leases without any formal surrender of their estate therein, and not bore for oil or gas, and not pay rentals, and that they could not be made to pay rentals because of the provisions in the leases themselves; in other words, that the very failure to pay would alone, under the leases, absolve them from liability for such monthly rental. If so, these leases are wholly one-sided. Where does the safety of the landowner come in under such a construction? What does he get for making a lease for the very purpose of having his land developed, or, in default of development, to receive his rental? He gets nothing under this construction. The lessee pockets his lease, and awaits the chances of wealth from speculation, spending nothing. The landowner gets naught, but perhaps he has lost his all from having his land thus tied up. Shall we make such leases a delusion and a snare? Did the landowner ever dream

that he was entering into a contract of the import which the Bettmans would assign to this contract? Indeed, did the lessees ever so regard it themselves? If it is capable of such a construction against the unwary, inexperienced, landowner, it is a delusion and a fraud, which no court ought to enforce. But we can give a construction to such leases which will vindicate and protect the rights of both sides to them. We can make the leases themselves speak a language and intention which shall subserve the purposes of right and justice. Let us look at the leases. They affirmatively stipulate for monthly payment to the lessee of a fixed rental until the completion of a well. Until the well is completed, that rental is the compensation given the landowner for having granted a monopoly as to oil and gas until a well comes in, and then it stipulates for the payment of a share of the oil or a fixed sum per gas well. The purpose here is plain. If we say that the failure to pay that rental monthly *ipso facto* releases the lessee from its payment, what is the use of the provision for payment? Why provide for payment, if failure to pay alone nullifies the provision for payment? The covenant to pay is brought to birth by the lease only to die at the hands of its mother. This construction renders the instrument self-contradictory. The lease cannot mean this nonsense. We must attribute some other meaning to it. If such be the meaning, where is the need of the clause giving the lessee right to surrender the lease at any time and discharge himself? If the other clause was intended to release him from the obligation to pay, this second clause, plainly made for the benefit of the lessee, would be useless. The clause stipulating for payment of rent is the only benefit which the lessor gets until development shall give him what moved him chiefly to make the lease, his share of oil, and he protected himself against the insolvency of the lessee, or his failure to pay by the clause forfeiting the lease for failure to complete a well or to pay rental. That clause of forfeiture was designed for his

benefit, and not for the lessee's benefit. It was the lessor's only safety. The clause giving the lessee a right at any time to surrender the lease and discharge himself from further liability is his ample shield. This construction gives all the clauses their fair operation. This construction is sustained by repeated decisions upon similar leases in the state of Pennsylvania. Those decisions are in a state where such questions have received more mature consideration, from the wide-spread prevalence of such leases, than in perhaps any other state, and they are entitled to great regard in other states; and I feel justified, as we have large interests of the kind in this state, in making a somewhat prolonged reference to them.

In *Galey* v. *Kellerman,* 123 Pa. St. 491, 16 Atl. 474, the lease said that a failure to complete a well or make the payment in lieu of it "renders this lease null and void and to remain without effect between the parties hereto." The lessees neither developed the territory nor paid rental in lieu thereof, and claimed that, as the lease provided that such failure should "render this lease null and void," it must be treated as void, not from and after the default, but *ab initio*, so that a cause of action accruing before or by reason of the default was extinguished by the lease itself. The court said: "This construction overlooks the character of the agreement and the relation of its covenants. The lessees secured by it the exclusive right to operate for oil and gas. On their part, and as consideration for the grant, they agreed to begin operations within sixty days, and within three months complete the first well. If they failed to do as they agreed, they promised to pay for delay $1,000 per annum. If they neither developed the land nor paid for their delay, they were, by such disregard of their contract, to forfeit all rights under it, and the lease was to be rendered thereby null and void. But the forfeiture did not happen until default. * * * The acts that forfeited their rights did not forfeit those of the lessor."

The court held that the lessor could recover the stipulated rental for the time the lessees held the exclusive rights to operate. The court said that the construction contended for by the lessee transferred the punishment for the breach of the contract from him on whose default it arose to the injured party, and said: "We should need the constraint of insurmountable necessity to induce us to adopt the construction contended for."

In *Wills* v. *Gas Co.,* 130 Pa. St. 222, 18 Atl. 721, the lease provided that, on failure to drill a well within a specified time, the lessee should pay $1,000 annually in advance thereafter, and that failure by the lessee to perform any of his covenants should work an absolute forfeiture, and the lease shall thereupon become null and void; and it was held that said clause was intended for the benefit of the lessor, and he had the option either to declare the forfeiture or affirm the continuance of the contract, and, if he did not choose to avail himself of the forfeiture, it could not be set up by the lessee as a defense to an action for the rent under the lease.

In *Leatherman* v. *Olliver,* 151 Pa. St. 646, 25 Atl. 309, the lease provided that the lessee should complete a well within six months, "or, in default thereof, pay to the party of the first part for further delay an annual rental of $500, payable quarterly in advance"; and that "a failure to complete said well or pay said rental for ten days after the time above specified for so doing shall render this agreement null and void, and it can only be renewed by mutual consent, and no right of action shall, after such failure, accrue to either party on account of the breach of any promise or agreement herein contained;" and it was held that on failure to drill the well the lessor was entitled to the stipulated rental, and that the latter clause did not deprive him of his right of action, as by the latter clause the parties meant that the lessor could not re-enter and treat the rights of the lessee as forfeited or abandoned on the day the default happened, but that he

must give the lessee 10 days of grace to make payment before he could take advantage of the default to terminate the lease, and that the lessee could not compel the lessor to re-enter so as to terminate the lease for the lessee's benefit, and that the lessor was entitled to recover his rental.

In *Phillips* v. *Vandergrift,* 146 Pa. St. 357, 23 Atl. 347, the lease provided that a well should be completed within a fixed time, or, in default, the lessee should pay a yearly rental, and that failure to complete such well or pay said rental "shall render this lease null and void, and not to be revived without the consent of both parties;" and it was held that such covenant was for the benefit of the lessor, and that the lessee by his own act of default could not relieve himself from a liability already incurred.

In *McMillan* v. *Philadelphia Co.,* 159 Pa. St. 142, 28 Atl. 220, the lease said that a "failure to complete such well, or comply with any of the foregoing conditions, or to make any of such payments within such time and at such place as above mentioned, renders this lease absolutely null and void, and no longer binding on either party, and will revest the estate herein granted in the lessor, and release the lessee from all his covenants herein contained, he having the option to drill said well or not, or pay said rent or not, as he may elect." Yet the court held that "this clause is for the benefit of the lessor, and he may assert the forfeiture or forbear to do so." The opinion says: "He [lessee] may drill the well, and so pay no rental, or he may pay the rental, and not be compelled to drill the well. It is not for the lessor, but it is for the lessee, to elect which he will do. This option was deducible from the stipulations of the lease, but the parties chose to put it in words and make it part of the contract. The contention of the defendant destroys the character of the whole contract. It makes the lessee say that he will drill a well within a given time, or, failing to do so, that he will pay a monthly rental,

but that he will do neither unless it pleases him, and, if he does neither, he shall be liable in no manner for his breach of contract. Such a construction is so unjust and absurd that the words relied upon as requiring it must be plain and unambiguous, and must be incapable of an exposition in harmony with the body of the contract, before we can consent to adopt it." The same doctrine will be found in *Cochran* v. *Pew,* 159 Pa. St. 184, 28 Atl. 219.

In *Conger* v. *Transportation Co.,* 165 Pa. St. 561, 30 Atl. 1038, the lease contained the clause: "A failure on the part of the second party to make any of the payments within 10 days after the time hereinbefore stated, and in manner provided for, renders this lease null and void, and to remain without effect between the parties, and it can be renewed only by mutual consent, and no right of any action shall, after such failure, accrue to either party by reason of the breach of any promise or agreement herein contained." And it was held that, upon failure to drill the well within 12 months, the lessor was entitled to the stipulated rental for each year of delay.

Thus, I say that the true construction of this lease on its face is not that which the plaintiff in error asks us to give it. Judge DENT suggests, also, that we may presume that the parties by tacit, mutual consent continued the lease, and this would entitle the plaintiff to recover his monthly rental until such tacit prolongation of the leases ended by the lessee's express surrender of them. I think this suggestion is fair and strong. It only adds strength to the conclusion which we reach, that the plaintiff was entitled to recover his rentals until the surrender of the leases.

It is assigned as error that the court allowed the plaintiff to release a part of the verdict. I do not see how, if there be no other error against the party complaining,—if the facts make him liable to the amount for which judgment

was rendered,—it lies in his mouth to complain of a release. Without further discussion, I refer to *Ohio River Co.* v. *Blake,* 38 W. Va. 718, 725, 18 S. E. 957.

We therefore affirm the judgment.

ENGLISH, J. (dissenting). I cannot concur in the opinion of a majority of the court handed down in this case, for the following reasons: William H. Roberts leased to W. D. Boyle, by separate leases, two tracts of land in Tyler county, W. Va., for the purpose and with the exclusive right of drilling for petroleum and gas, both leases being dated July 5, 1892, one of which tracts contained 112 acres, and the other 100 acres. About August 3, 1892, these leases were assigned to M. A. and D. Bettman, which assignments were signed by W. D. Boyle and William H. Roberts. The leases were thus transferred to said M. A. and D. Bettman, with all their covenants unchanged in any respect, except that the Bettmans were to pay the rentals instead of W. D. Boyle, which rents were to be paid at McCormick & Morrison's store, in Tyler county; and in these assignments by said Roberts and Boyle it was stated that a failure to pay these rentals for 10 days for any month after they became due would render the said leases null and void, and they should be surrendered by Bettman & Bettman to Roberts, and the rentals should cease. No oil or gas was found on these tracts, and Bettman & Bettman notified Roberts that, unless he would reduce the rentals, they would surrender the property. This notice was given the latter part of November, 1892, and Roberts replied, "All right; when you stop paying the rentals that ends the lease." By the terms of said lease, Bettman & Bettman were to pay $100 per month in advance until a well was completed, and it was positively agreed between Bettman & Bettman and Roberts that, when the rent was not paid when due, that fact of itself ended the leases, and neither should have the right of action against the other. On the 2d of October, 1893, said Roberts brought

an action of covenant upon said two leases against Bettman & Bettman, partners, etc., making profert of the same, and purporting to set out the covenants and conditions therein contained in his declaration, claiming that $1,800 of the rent became due and was owing to the plaintiff from said defendants, and still unpaid, contrary to the covenants in the two indentures contained, to the damage of the plaintiff $3,000. On April 12, 1894, the defendants, by counsel, craved oyer of the deeds described in the declaration, read to them, and demurred generally to the plaintiff's declaration, in which demurrer plaintiff joined. Demurrer was overruled, and thereupon the defendants pleaded covenants not broken, conditions performed, and payment, to which the plaintiff replied generally, and issue was joined thereon. The action of the court in overruling defendants' demurrer to said declaration is assigned as error. Was this assignment well taken, and did the court err in overruling said demurrer?

By craving oyer of the leases sued upon, they became part of the declaration, and may be examined; and, when said leases are read and compared with the averments of the declaration as to the covenant they contained, it is preceived that in declaring upon said leases the pleader omitted in each instance, after the words, "and a failure to complete such wells or to pay said rental when due or within ten days thereafter, shall render the lease null and void," to insert the words, "and can only be renewed by mutual consent, and no right of action shall after such failure accrue to either party on account of any covenant herein contained;" which covenant is found in each of said leases made profert of in the declaration.

Let us next inquire what the effect is of craving oyer of the leases sued on, and we find in the case of *Jarrett's Adm'rs* v. *Jarrett,* 7 Leigh, 93, it was held that if, in an action on a deed, plaintiff makes profert of the deed in his declaration, and defendant takes oyer of it, the deed is thereby made

part of the declaration, and defendant cannot object to the deed as evidence on the trial, on the ground of variance. When, however, these leases were, by craving oyer, made part of the declaration, can we say that the court acted properly in overruling the demurrer to the declaration as then presented, the lease being made part thereof? The declaration avers that the defendants failed to complete a well on said leases, and also to pay the rental when due, or within ten days, which would operate to render such leases null and void, and place them in such condition that they could only be renewed by mutual consent; and it was further covenanted that no right of action should, after such failure, accrue to either party on account of the breach of any covenants therein contained. It cannot be successfully controverted that this action was brought in direct opposition to this covenant. It cannot be said that this covenant was intended solely for the benefit of the lessor, because the express language of the covenant is that no right of action after such failure should accrue to either party on account of the breach of the covenants therein contained, and this covenant is just as obligatory upon the parties as any other it contains. Beach on Modern Contracts (volume 1, § 151), in speaking of sealed instruments and consideration, says: "The statutes merely make it necessary for the courts to gather the intention of the parties entirely from the instrument. They substitute the intention of the parties for the form of the instrument." And in section 473 the author says: "By release of all actions, actions real, personal, or mixed are discharged, and so are all causes of action." And in section 482 he says: "A bond or covenant not to sue is equivalent to a release." And at section 735, speaking of the construction of deeds, says: "The construction of deeds follows the rules of law in regard to the construction of other contracts in writing. A deed of conveyance, like all other instruments, will be read by the court in the sense of the meaning of the parties. The

intention will prevail wherever such intention is unmistakably manifested, having regard to all parts of the instrument. * * * In determining the meaning of the parties, recourse must be had to the whole instrument. * * * The intention as gathered from the whole instrument must prevail." Parsons on Contracts (volume 2, p. 622), speaking of the construction of contracts, says: "So, for the same reason, all the parts of the contract will be construed in such a way as to give force and validity to them." In the case of *Barber* v. *Insurance Co.*, 16 W. Va., 658, this court held (third point of syllabus) that in the construction of contracts the provisions thereof shall be taken into consideration, and reconciled, if possible, so that the true intent of the parties to the contract may be ascertained.

The plain and manifest intention of the parties to these leases was to avoid litigation. The plaintiff having made profert of said leases, and the defendants, by craving oyer of the same, having made them part of the declaration, we must look to the entire deeds for the contract which is sought to be enforced; and the intention of the parties, as it is disclosed by the deeds, constitutes the contract; and this, when ascertained by proper construction of the contract, will be enforced by the court. Looking, then, at these leases as presented by the pleadings, can we discover any right thereby conferred upon the plaintiff to recover rent after failure on the part of the defendants to pay the same when due? On the contrary, all said in regard to payment of rental is as follows: "The said rental shall be deposited to the credit of the party of the first part at ————, or paid direct to said first party; and a failure to complete such well, or to pay said rental when due, or within ten days thereafter, shall render this lease null and void, and can only be renewed by mutual consent, and no right of action shall after such failure accrue to either party on account of the breach of any covenants herein contained." It was also agreed that the

party of the second part should pay to the first party $100 per month, in advance until a well was completed, from the date of said leases on each tract of land; and, further, that the party of the second part should have the right at any time to surrender said leases to the party of the first part, and thereafter should be fully discharged.

Now, even if it be true that the defendants suffered rent to accrue against them by their failure to surrender said leases promptly, yet it was expressly provided that a failure to pay said rental for ten days for any one month after it had become due, should make said indentures null and void, said rentals should cease, and the leases be surrendered. By the terms of the leases, the surrender of them was not a condition precedent to the ceasing of the rent, as stated in the declaration, but it was expressly provided that, upon failure to pay the rent when due, or within ten days, the leases should be null and void, and could only be renewed by mutual consent, and no right of action should, after such failure, accrue to either party on account of the breach of any of the covenants therein contained; yet the plaintiff, by his declaration, claims rental for nine months after the alleged failure to pay. My conclusion, therefore, is that the plaintiff, on the face of his declaration, has shown that he is not entitled to sustain his action, and the court erred in overruling the defendants' demurrer, and judgment should have been rendered for the defendants on the demurrer.

Affirmed.

SILVER VALLEY MINING COMPANY v. NORTH CAROLINA SMELTING COMPANY.

(122 North Carolina 542; 29 S. E. 940. Supreme Court. April 26, 1898.)

The court construes a contract. Where a contract is clear and certain in its terms and meaning, and there is no latent ambiguity necessitating proof of a custom to interpret its meaning, its construction is for the court and not for the jury.

A special custom of smelters cannot control an express contract clear and free from ambiguity on the point supposed to be covered by the custom.

[1]**Smelter contract to pay 95 per cent. of product.** A contract to pay the miner 95 per cent. of the silver produced from his ore means 95 per cent. of the result or product—not 95 per cent. of the assay value of the silver in the ore.

New trial on single issue. Where, in the trial of an action in which several issues have been submitted and responded to, an erroneous instruction was given upon one issue entirely distinct and separable from the other issues and matters involved in the case, and a new trial can be had upon such issue alone without danger of complication, the new trial will be confined to such issue.

Appeal from Superior Court, Davidson County; Starbuck, Judge.

Action by the Silver Valley Mining Company against the North Carolina Smelting Company for money due under a smelting contract. From a judgment for plaintiff, defendant appeals. Reversed.

[1]Smelter not liable under ordinary contract for mineral left in the tailings, there being no proof of negligence. *Guild Co.* v. *Mason*, 115 Cal. 95; 46 Pac. 901.

Contract for sliding scale of assays. Measure of damages for refusal to receive the ore. *Guillon* v. *Earnshaw*, 169 Pa. 463; 32 Atl. 545.

Quality of ore left to buyers foreman. Damages for delay and refusal to receive shipments. *Alleghany Co.* v. *Teaford*, 96 Va. 372; 31 S. E. 525.

Contract to deliver "free from foreign substance." *Worthington* v. *Gwin*, 119 Ala. 44; 24 So. 739.

A contract for 70 per cent. of the assay value means the average assay of all the deliveries. *Fox* v. *Mackay*, 125 Cal. 54; 20 M. R.—.

WATSON, BUXTON & WATSON, for plaintiff.

E. E. RAPER for defendant (appellant).

MONTGOMERY, J. On the trial below his honor instructed the jury that "the amount due to the Silver Valley Mining Company, the plaintiff in the action, by the smelting company, the defendant, is $309.96, unless you shall find from the evidence that there is a special custom among smelters that all the ores are to be paid for at assay value; and, in case you should find there is such custom, then the amount due on said contract, if you believe the evidence, is $2,803.92."

The correctness of this instruction depends upon whether or not the contract between the parties, on its face, is clear and certain in its terms and meaning. If it is clear and certain in its terms and meaning, and there is no latent ambiguity which necessitates the proving of a custom to interpret the meaning of the contract, then the instruction was wrong, and the defendant's exception thereto was well taken.

We will examine the contract. It, in substance, provided that the mining company was to furnish to the smelting company 450 tons, more or less, of Silver Valley ore; that the smelting company was to do the work of smelting the ore for $10 for each and every ton of ore so worked and smelted, as working charges therefor, and pay to the mining company 95 per cent. of the silver contents of the product of the ore after deducting therefrom the smelting charges of $10 per ton.

In our opinion, the construction of the contract was one of law, and should not have been submitted to the jury. The words "95 per cent. of the silver contents of the product of said ore," mean 95 per cent. of the ore reduced to its smelted condition. It cannot mean 95 per cent. of the silver contents of the mass of ore as it was dug from the earth, and before it was subjected to the smelting process. The defendants clearly did not contract, nor did they intend to contract upon an assay

made of the ore containing the silver metal before it was smelted, but they contracted upon the basis of the product resulting from the smelting process. If the contract could be made clearer than it is on this point, it is made so by the fourth section of the contract between the parties. There it is agreed between the parties that the smelting company shall not be called on to pay the mining company the 95 per cent. of silver "produced from said ore as aforesaid"; that is, the 95 per cent. is not to be paid upon an assay made upon the crude earth containing the metal, but upon the silver which is contained in the product of the smelting process.

His Honor's charge was based upon Ledoux & Co.'s assay, and that assay was made upon the ore before it had been subjected to the smelting process. It was provided in the contract that the 95 per cent. of the silver should be the silver produced under the smelting process, and not upon the silver contained in the ore, by assay, before it was smelted. There was error, therefore, in that instruction of the judge.

That erroneous instruction, however, is entirely distinct and separable from the other issues and matters involved in the case, and there can be a new trial in respect thereto without danger of complication, and the defendants are entitled to nothing more at the hands of the court.

There was evidence going to show that the deed of trust and confessed judgment in favor of the defendants Glorieux and Woolsey were executed and confessed for the purpose of hindering and delaying the plaintiff in the collection of its debts, and to fraudulently subject to execution sale the property of the smelting company, that they might purchase the same for their own advantage, and to the injury of the other creditors of the smelting company. The judgment below will be reformed so as to reopen the first issue which was submitted on the trial.

New trial on first issue.

WILLIAM BECK v. WILLIAM O'CONNOR ET AL.

(21 Montana 109; 53 Pac. 94. Supreme Court. May 9, 1898.)

A failure to specify errors or to set out the instructions complained of will justify the dismissal of an appeal.

[1]**Lien of co-lessee advancing funds.** Where the lessees of a mine which the lease provided should be worked continuously, or the lease be forfeited, assigned an undivided interest in the lease to O., on condition that he comply with the terms of the lease, and afterwards assigned their remaining undivided interest to B., O., doing all the work on the premises, is entitled to a lien on the interest of B. for his share of the work and expenditures necessary to preserve the lease.

Appeal from District Court, Carbon County; Frank Henry, Judge.

Action by William Beck against William O'Connor and another. Judgment for defendants, and plaintiff appeals. Affirmed.

Statement of the case by the Justice delivering the opinion.

[1]Agreement between co-owners to do certain work chargeable to their interests only and not as a debt: Held no lien on the mine. *Frowenfeld* v. *Hastings*, 134 Cal. 128; 21 M. R. —.

The purchaser at foreclosure promised the mortgagor he might redeem, i. e., if mine was sold, mortgagor could have all over enough to reimburse: *Held*, that the mine could not be held for a debt contracted by the mortgagor. *Eaton* v. *Rocca*, 75 Cal. 93; 16 Pac. 529.

A partner has no lien for past balance due him by his co-tenant as against the mortgagee of such co-tenant's interest. *G. V. B. Co.* v. *Bank*, 95 Fed. 35; 20 M. R. —.

Each member of a mining partnership has a lien on the partnership property. *Duryea* v. *Burt*, 11 M. R. 395.

A judgment is a lien on an unpatented claim and the judgment creditor is not bound to adverse. *Butte Co.* v. *Frank*, 25 Mont. 344; 21 M. R. —.

This is an action to recover the sum of $1,250, which plaintiff claims to be due as a balance of the purchase price of an interest in a bond and lease sold by him to the defendant O'Connor in and to certain mining property mentioned in the complaint.

From the record it appears that on the 24th day of September, 1891, George W. Stapleton and others leased to Henry Addoms and Mark Welch a mining claim in Silver Bow county, known as the "Spur Lode Mining Claim," for the term of one year. By the terms of said lease, the lessees bound themselves and their assigns to take possession of the leased premises, and work and mine the same in an economic, proper, and miner-like manner, and especially to sink an incline, which had already been sunk on said premises 200 feet, an additional depth of 100 feet, of the same size as the incline already constructed, and to properly timber the same. It was provided in said lease that the lessees should work the property continuously during the term of the lease, and that a failure to work it for a period of ten consecutive days should operate as a forfeiture of the lease. The lease also provided that a failure on the part of the lessees to comply with any of the terms or covenants contained therein should work a forfeiture thereof. The lessors, at the time of the execution of the lease, executed to the said Addoms and Welch a bond for a title to the leased property, upon the condition that the said Addoms and Welch should pay to them the agreed purchase price within the time specified in said bond. Thereafter Addoms and Welch assigned to L. B. Olds an undivided five-sevenths interest in the lease, and in all the estate, right and title acquired thereunder, upon the condition that said Olds comply with the covenants and terms of said lease, and at the same time assigned to said Olds the undivided five-sevenths interest in and to the title bond above mentioned, together with a five-sevenths interest in all rights, title, and estate to be acquired thereunder, upon condition

that Olds would carry out and perform the conditions of said bond. Olds immediately entered into possession of the leased premises, and commenced to work and mine the same, in accordance with the terms of the lease. Addoms and Welch never did any work on the leased premises. In February, 1892, Addoms and Welch conveyed by quitclaim deed to the plaintiff, William Beck, a two-sevenths interest in and to the lease and bond mentioned above. Such interest was conveyed to Beck without the written consent of said lessors.

On the 15th day of March, 1892, Beck entered into a written contract with defendant O'Connor, by which he sold to O'Connor a one-third of the two-sevenths interest in and to the lease and bond in question, for the sum of $4,250, $3,000 of which was paid, leaving the balance for which this suit is brought to be paid as soon after June 15th following as the said O'Connor could determine that the interest he had purchased of Beck in said lease and bond was free and clear of all charges, incumbrances, liens and assessments, of whatever nature or kind. Thereafter O'Connor, it is alleged, ascertained that there were incumbrances, liens, and assessments upon the interest and title to the lease and bond sold to him by the plaintiff, amounting to a sum largely in excess of the amount sued for, and notified the plaintiff thereof, and demanded that he remove said liens and incumbrances, or execute to him security to hold him harmless against such liens and assessments, and declined to pay the sum sued for, unless the plaintiff would remove such liens and assessments upon the interest purchased in the lease and bond, or give to him the indemnity demanded. The plaintiff refused either to discharge the liens and assessments against the interest in the lease and bond sold to the defendant O'Connor, or to indemnify him as demanded.

After the commencement of this suit against O'Connor, O'Connor answered, setting up substantially the facts as aforesaid, and alleging that, in purchasing the interest in

the lease and bond mentioned, he acted solely as the agent of defendant Cooper, disclaiming any interest personally in the matter, and asking that Cooper be made a party to the suit. Thereupon the court made Cooper a defendant, who answered, setting up substantially the same facts as those contained in the answer of O'Connor, and asked judgment against the plaintiff for the sum of $3,000 and interest, which sum had been paid to the plaintiff for the interest in the bond and lease sold to the defendant, on the ground that the title of the plaintiff to the interest in the lease and bond conveyed had wholly failed.

The cause was tried with a jury, and a verdict rendered in favor of defendants for the sum of $3,000, upon which verdict judgment was duly entered. From the judgment and an order refusing a new trial, the plaintiff appeals.

J. L. STATTS, for appellant.

SYDNEY FOX and CAMPBELL & STARK, for respondents.

PEMBERTON, C. J. We have felt very much inclined to dismiss this appeal on account of the utter failure of counsel to comply with the rules of court in relation to the preparation of his brief.

Subdivision 3 of rule 5 (44 Pac. vii) is as follows: "Contents of Brief. This brief shall contain in the order here stated: (1) A concise abstract or statement of the case, presenting succinctly the questions involved, and the manner in which they are raised, which abstract shall refer to the page numbers in the transcript in such manner that pleadings, evidence, orders and judgment may be easily found. (2) A specification of errors relied upon, which shall set out separately and particularly each error asserted and intended to be urged. When the error alleged is to the admission or to the rejection of evidence the specification shall quote the full

substance of the evidence admitted or rejected. When the error alleged is to the charge of the court, the specification shall set out the part referred to *totidem verbis,* whether it be instructions given or instructions refused."

Counsel has absolutely ignored this rule. The brief contains no proper statement of the case, no specifications of errors, nor any instruction given or refused of which counsel complains. As a consequence, we have been compelled to go over and over, through and through, time without number, a poorly prepared, bunglesome transcript, to find the matters complained of by counsel. Such utter disregard of the rules of court by an appellant in this respect will in the future be punished by a dismissal of the appeal. We must either punish such seeming contempt for the rules of court, or abolish them.

At the trial of this case, the court permitted the defendants to prove the terms and conditions of the lease and bond from Stapleton and others to Addoms and Welch, under which the plaintiff claimed title to the interest therein sold to defendants, for the purpose of showing that it was absolutely necessary, under such terms and conditions of said lease, for Olds to do the work he performed, and make the expenditures he did, to keep alive his own and plaintiff's interest and title under the lease to the leased premises, and that, if Olds had not done such work on said premises, plaintiff's interest and title under and to the lease and bond would have wholly failed. It is not claimed that plaintiff ever did any work or expended any money to preserve the title to or under the lease and bond which he sold to defendants, but that Olds did preserve and keep alive such title by his work and expenditures on the leased premises under the lease. The court instructed the jury that, under such circumstances, Olds had a claim against plaintiff for his share of the work and expenditures, and was entitled to a lien against his interest in the leased premises acquired

under and by the assignment of the two-sevenths interest of the lease and bond by Addoms and Welch. To the admission of this evidence and the giving of such instructions, the plaintiff excepted, and assigns such action of the court as error.

Counsel contends that plaintiff and Olds were co-tenants of the leased premises, and that he was not liable for any expenditures Olds might or did make thereon. If plaintiff and Olds had been the owners as co-tenants of the premises in controversy, the argument of counsel that one cotenant could not incumber the interest of another by work or expenditures thereon would have been pertinent, and perhaps conclusive. But we have a different case here. Whatever interest Olds had or the plaintiff acquired was under the lease from Stapleton and others to Addoms and Welch. In order to preserve any interest under the lease, the leased premises had to be worked continuously by the lessees or their assignees. Olds did work the leased premises continuously, and made large expenditures thereon, to preserve the leasehold estate; and such work and expenditures necessarily inured to the benefit of plaintiff. Plaintiff became a party to the lease by purchase from Addoms and Welch, and was bound by its terms. He could not, in equity, appropriate the benefits resulting from the work and expenditures of Olds on the premises without becoming liable for his share of the work and expenditures necessary to preserve the leasehold estate. Therefore Olds had a claim against plaintiff, and was entitled to a lien on his interest therein for his share of such work and expenditures. *Prentice* v. *Janssen,* 79 N. Y. 478; *Jenkins* v. *Jenkins* (N. J. Ch.) 5 Atl. 134; *Eads* v. *Retherford* (Ind. Sup.) 16 N. E. 587, and authorities cited; *Holbrooke* v. *Harrington* (Cal.) 36 Pac. 365; Freem. Co-Ten. 322. The amount chargeable to the interest of plaintiff in the premises was far in excess of the amount sued for. Plaintiff, it is conceded, refused to pay this sum

or discharge the lien Olds was entitled to against the interest sold to defendants, by reason whereof plaintiff's title to the premises and to the interest in the lease and bond sold to the defendants wholly failed. Under such circumstances, plaintiff had no right of action against the defendants or either of them, and they were certainly entitled to recover the money they had paid for a title that had wholly failed. Plaintiff's contract bound him to convey a good title. He did not do it. He refused to perform the conditions and terms of the Stapleton lease upon which the preservation and completion of the title he sold depended.

There are other assignments of error, but, being of the same character, they are necessarily determined by the above treatment of the main question involved. We think the case was fairly tried and determined upon its merits.

The judgment and order appealed from are affirmed.

Affirmed

HUNT and PIGOTT, JJ., concur.

BOILEAU v. HEATH.

(Law Reports (1898) 2 Ch. 301. In the Supreme Court of Judicature, Chancery Division. May 23, 1898.)

[1]**Refuse left by lessee acquiring subsequent value. Dumps not mineral deposits.** A lessee working an iron mine accumulated on the surface and left at the end of his lease immense mounds of tap-cinder, the refuse after treating the iron ore on the premises. These dumps were at the time wholly unsalable, but afterwards acquired a commercial value. After the surrender of the iron lease the premises were demised and worked for the remaining ironstone and the underlying coal. Such lessees, the defendants, began to sell and remove the contents of the mounds. *Held*, 1. That the mounds were realty.

2. That the tenants, lessees of the coal and iron, had no right to work these mounds.

3. That the demise of all mines, seams, beds, etc., did not apply to an artificial deposit on the surface.

The plaintiffs were the Norwich Union Life Insurance Society, and its trustees, the owners of the Clough Hall Ironworks and Collieries in the county of Stafford, and for some years before and up to December, 1892, they had leased it

[1]The refuse ore from a zinc mine was found to have value for making artificial stone: *Held*, that the lessee could not dispose of it for such purpose. *Doster* v. *Friedensville Zinc Co.* 140 Pa. 147; 21 Atl. 251.

Construction of contract whereby plaintiff contracted to work dump, holding that for want of fixed price and time of payment there was no sale. *Foster* v. *Lumbermen's Mining Co.* 68 Mich. 188; 36 N. W. 171.

Lessee has no right to rework coal set aside, as at the time unmarketable. *Genet* v. *Delaware Co.* 43 N. Y. Sup. 589.

Right to dump as an appurtenance, see *Scheel* v. *Alhambra Co.* 18 M. R. 616.

Where a lease called for the ownership in lessor of the refuse coal which had at the time no market value it is no breach of his lease that the tenant dumped it on a common heap used as dump for several mines. *Lance* v. *Lehigh Co.* 163 Pa. 84; 29 Atl. 755.

to the Kidsgrove, Steel, Iron and Coal Company, Limited, which got into difficulties and was wound up. On December 16, 1892, there being then rent in arrears, the plaintiffs obtained an order of the court for re-entry, and took possession on that date; and so the lease to the Company terminated.

The present action was brought with reference to certain mounds or heaps of mineral refuse lying on the surface of the land and composed of "tap-cinder" or "puddlers' taps." The mounds came into existence during the tenancy of the Kidsgrove Company, and were produced in the course of the ordinary working of the ironstone of the mine. The ironstone was worked as follows: It was first raised from the earth and then calcined by being placed in heaps and fired by means of a mixture of slack, this causing a considerable reduction in the weight. It was after this process that the weight was taken for the purpose of ascertaining the amount of royalty payable to the landlords. The calcined ore was then liquified in a blast furnace by means of coal and limestone, the metallic fluid sinking to the bottom and the cinders and other refuse, which floated on the top, being drawn off and cast on spoil heaps as being of no value. These were not the heaps in question. The fluid was drawn off into moulds and formed pig iron. The pigs were then taken to another part of the works and put into puddling furnaces, and during the process of puddling large quantities of "tap-cinder" were produced, which were drawn off from the furnaces in small wagons and thrown into heaps on the ground, and in course of time made up the mounds now in dispute. This tap-cinder, of which there was said to be about 100,000 tons on the works, consisted chiefly of protoxide of iron and silica. When the plaintiffs re-entered, the mounds were on the ground, and no claim to them was made by the outgoing company.

The plaintiffs, having re-entered, kept the mines going on

their own account for a few weeks, and in February, 1893, entered into an agreement for a lease of the premises to the defendants, R. Heath, J. Heath, and A. H. Heath. By this agreement it was provided that the term should be for forty-two years at a minimum rent of 2,000 *l.* a year, that the royalties should be the same as those payable under the Kidsgrove lease, with the addition of 1 *d.* per ton for slack, and that the lease should include all mines from the surface down to and including what was called "the silver mine." It was however, expressly provided that the defendants should not be bound to work the ironworks, it being expressed to be their intention to remove and dispose of the plant and machinery connected therewith. By an agreement of even date the plaintiffs sold to the defendants the plant and machinery then on the premises for 25,000 *l.* The money was duly paid, and the defendants entered into possession on February 1, 1893. They had since worked the mines, but only for coal, and, therefore, they had not added to the mounds of tap-cinder. The lease was not executed until August 28, 1897, after the commencement of the present action.

Soon after the defendants had entered into possession the plaintiffs put forward a claim for nearly 3,000 *l.* for tools, stores and other similar chattels on the premises when the defendants entered, and which it was contended did not pass under the sale of "plant and machinery," and cross-claims were made by the defendants. The claims formed the subject of a settlement, the terms of which were reduced into writing on February 28, 1895. The document was headed "Terms of settlement of matters in dispute," and it provided, inter alia, that the defendants should pay the plaintiffs 1,000 *l.* in full and final settlement of all their claims "to stores and all other effects upon the premises."

The defendants began to work the mines in March, 1894, and they also sold and allowed to be removed many tons of the tap-cinder, which in the meantime had become marketable.

This action was brought for an injunction to restrain the defendants from dealing with the heaps or mounds of tap-cinder, and for an account of the sales and payment of the proceeds.

At the trial of the action, on May 18 and 19, 1898, it was suggested in argument by the defendants' counsel, that the mounds passed to the defendants under the above mentioned settlement; but Bigham J. held that they did not, and that under the circumstances the words "stores and all other effects" only covered the items in the claim then made, and any other items of a similar kind which might have been overlooked.

The principal arguments, as to whether the mounds were chattels or passed to the defendants under their lease, were as follows:

WARMINGTON, Q. C., H. TERRELL, Q. C. and YOUNGER, for the plaintiffs. The heaps of refuse slack, called puddlers' taps, are several acres in extent, and amount to 378,000 tons. They do not pass to the defendants under the words "mines and minerals" in their lease. *Scott* v. *Midland Ry. Co.* (1897) 13 Times L. R. 398; *Lord Provost of Glasgow* v. *Farie,* (1888) 13 App. Cas. 657. They are part of the freehold, not chattels. But if they are chattels, they were never intended to pass, and do not pass to the defendants under the settlement. They fall rather within the principle of *Elwes* v. *Brigg Gas Co.* (1886) 33 Ch. D. 562, the case of a prehistoric boat found embedded in the soil of land demised to the defendants.

COZENS-HARDY, Q. C., BRAY, Q. C. and STOKES, for defendants. The mounds are chattels, and have been purchased by us from the plaintiffs, and if they are not our property they certainly do not belong to the plaintiffs. They are the residuum of something on which the former lessees paid royalty. Plaintiffs could not have stopped the former lessees from selling the taps. They were intended to remain as chat-

tels; if not, when did they cease to be chattels?" Perhaps the true rule," says Blackburn J., "is, that articles not otherwise attached to the land than by their own weight are not to be considered as part of the land, unless the circumstances are such as to shew that they were intended to be part of the land, the *onus* of shewing that they were so intended lying on those who assert that they have ceased to be chattels": *Holland* v. *Hodgson,* (1872) L. R. 7 C. P. 328, 335. If the mounds are not chattels, they passed to us as minerals under the lease.

H. TERRELL, Q. C., in reply. The mounds were not included in the settlement with the defendants. If they were chattels, they were there when defendants took possession, and they cannot set up title to them against their landlords. The term "minerals" has never been held to include anything except that which is part of the natural soil: *Elwes* v. *Brigg Gas Co.,* Supra.

Cur. Adv. Vult.

May 23. BIGHAM, J. (after recital of the facts, from which the statement above is derived, and after deciding as already mentioned that the mounds did not come within the words "stores and all other effects"). It was said by the defendants that tap-cinder had always been of some value for road-making and so on, and it was suggested that the heaps were kept separate from the other refuse heaps formed from the blast furnaces—admittedly mere waste—because of the value of the tap-cinder. I am, however, of opinion, that the tap-cinder in the time of the Kidsgrove Company was of no value at all, and that the fact that it was thrown into heaps on a different part of the ground from that occupied by the other refuse heaps, was due merely to the circumstance that the blast furnaces, where the one kind of refuse was produced, were away from the puddling furnaces where the tap-cinder came into existence. There was no proof before me that the Kidsgrove Company ever sold an ounce of

tap-cinder, and I cannot help thinking that an insolvent company would have turned an asset of that kind into money if it had been possible to do so. And it is clear that when the liquidator was winding up the company he got nothing for it, either from the plaintiffs or from any one else. It was not regarded as an asset, although no doubt it formed part of the products of the mines on which the Kidsgrove Company had paid royalty. The conclusion I come to is that these mounds are not chattels at all. No doubt when the material was first found it would have been competent for the Kidsgrove Company to have treated it as their own, and to have sold it if they could for their own benefit. But they could not sell it and did not want to sell it, and when they piled it on the earth their intention was that it should once more form part of the earth out of which it had been produced, and should no longer be, if ever it was, of the nature of a chattel. These mounds are not chattels, and even if they are, the property in them never, in my opinion, passed to the defendants. By reason of scientific discoveries since the date when the defendants entered into possession of these mines the tap-cinder has become valuable and saleable, and this fact explains the claim which the defendants are now making. It appears that the defendants began to work the mines in March, 1894, and they have already sold about 20,000 tons of the tap-cinder at from 4*s.* to 6*s.* a ton. When the plaintiffs first heard that this was being done, they, or their manager, Mr. Lucas, apparently thought that the defendants ought to pay a royalty on the footing of the mounds forming part of the leased mines, and there are some letters in which Mr. Lucas puts forward this view. If, however, the defendants are entitled to work the mounds as being part of the demised premises, I am of opinion that they may do so without paying any royalty. The royalties are payable only in respect of calcined ironstone, coal, slack, and cannel; and tap-cinder is, in my opinion, none of these.

But are the defendants entitled under their lease to work the mounds at all? Mr. Cozens-Hardy says they are. His contention is that if the mounds are not chattels, but form part of the soil, they pass to the defendants under the lease, and may be removed by them for their own profit. I do not think this contention is sound. What is leased is, first, the coal, then the ironstone, and then "all mines, seams, veins, and beds, as well opened as unopened, of all other minerals and clay lying and being within and under the lands from the surface down to and including the silver mine." In my opinion this description applies only to what may be called natural formations in and on the land, not to artificial formations, such as these mounds. These mounds are not iron or ironstone, nor are they coal, slack, mines, seams, veins, or beds, either opened or unopened, or any other minerals within the meaning of the lease. For these reasons I give judgment for the plaintiffs with costs.

(His Lordship accordingly declared that the defendants were not entitled to the tap-cinder, or puddlers' tap, and were not entitled to remove them; that the plaintiffs were entitled to them; and that the plaintiffs must have an injunction against the defendants to restrain them from removing or selling the taps, and an inquiry as to the taps already removed, and payment of the value thereof.)

Solicitors for plaintiffs: HARTCUP, DAVIS & COBBOLD, for W. T. Hartcup, Norwich.

Solicitors for defendants: W. SANDERS FISKE, for Knight & Sons, Newcastle-under-Lyme.

[1]SHOSHONE MINING CO. v. RUTTER ET AL.

(87 Federal 801. Circuit Court of Appeals, Ninth Circuit. May 23, 1898.)

[2]**Federal jurisdiction of adverse claim suit.** A suit brought in pursuance of Rev. St. § 2326, based upon an adverse claim made upon the filing of an application for a patent for mining ground, is a suit arising under the laws of the United States, and is within the jurisdiction of the circuit court.

Adverse claim suit is equitable action. Suits brought in pursuance of Rev. St. § 2326, to determine adverse claims to mining ground, are in their nature equitable, and not legal, actions. 75 Fed. 37, affirmed.

Relocation. Extending limits under new name. A locator may relocate his mining claim, including additional vacant ground unclaimed by others, under a different name, and convey it by the designation of the last name.

[3]**Sufficient discovery of lode.** Seams containing mineral-bearing earth and rock, discovered on a claim before its location, were similar to seams that had induced other miners to locate claims in the same district, and which by development had proved to be a part of a well-defined lode or vein containing ore of great value. ***Held,*** a sufficient compliance with Rev. St. § 2320, requiring the discovery of a lode or vein within the limits of a claim before a valid location thereof can be made.

Appeal from the Circuit Court of the United States for the Northern Division of the District of Idaho.

W. B. HEYBURN, for appellant.

JOHN R. MCBRIDE and GARBER & GARBER, for appellees.

Before Gilbert and Ross, Circuit Judges, and Hawley, District Judge.

[1]Reversed for want of Federal Jurisdiction, 177 U. S. 505.

[2]*Contra, Blackburn* v. *Portland Co.* 175 U. S. 571; 20 M. R. —.

[3]*Hayes* v. *Lavagnino*, 17 Utah 185; 19 M. R. 485.

Neither walls nor pay ore required but the crevice must show rock so colored or decomposed as to be distinguishable from the country. *Burke* v. *McDonald*, 17 M. R. 325.

HAWLEY, District Judge. This is a suit in equity brought under the provisions of section 2326 of the Revised Statutes to determine the rights of the respective parties to certain mining ground situated in Yreka mining district, Shoshone county, Idaho. On August 21, 1895, appellant applied for a patent to the Shoshone lode claim. Appellees thereafter filed their protest and an adverse claim against said application, and in due time commenced this suit in support of their claim in the circuit court of the United States for the district of Idaho. Both parties are citizens and residents of the state of Idaho. A demurrer was interposed to the complaint, and overruled by the court. 75 Fed. 37. The cause thereafter came to issue, was tried upon its merits, and resulted in a decree in favor of the appellees. The questions presented by the demurrer will be first considered:

1. Appellant claims that the circuit court had no jurisdiction to try the case. Does the complaint in this case show upon its face that the suit is one arising under the laws of the United States? This question, under the repeated decisions of the courts in this and other circuits, has been, so far as we are advised, universally answered in the affirmative. Different grounds have been stated and different reasons assigned by the various courts, but the conclusion has always been the same,—that the circuit courts of the United States have jurisdiction to try all cases instituted under and by virtue of the provisions of section 2326 of the Revised Statutes, independent of the question of citizenship of the respective parties. *Frank G. & S. M. Co.* v. *Larimer M. & S. Co.*, 8 Fed. 724; *Cheesman* v. *Shreve*, 37 Fed. 36; *Doe* v. *Mining Co.*, 43 Fed. 219; *Strasburger* v. *Beecher*, 44 Fed. 209, 213; *Burke* v. *Mining Co.*, 46 Fed. 644, 646; *Wise* v. *Nixon*, 76 Fed. 3, 6. But it is argued by appellant's counsel that all of these decisions have been virtually overruled by the decision of the supreme court in the case of *Bushnell* v. *Mining Co.*, 148 U. S. 682, 13 Sup. Ct. 771. As we under-

stand the decision in that case, no such question as is here presented was there raised, discussed, or decided. That action was brought in the state court, tried in the state court, and an appeal was taken to the supreme court of the state; and after a petition for rehearing was filed the losing party for the first time suggested that a federal question was involved to wit, a construction of section 2322 of the Revised Statutes. The petition for rehearing being denied, a writ of error was sued out, and the case taken to the supreme court of the United States. The writ of error was there dismissed upon the ground,—to quote the language of the decision:

"The attempt to raise for the first time a federal question in a petition for rehearing, after judgment, even assuming that the petition presented any such question, is clearly too late. It has been repeatedly decided by this court that a federal question, when suggested for the first time in a petition for rehearing, after judgment, is not properly raised, so as to authorize this court to review the decision of the highest court of the state."

No question was raised as to the competency of the courts, either national or state, to try a case brought under the provisions of section 2326. The only question at issue there, under the pleadings and at the trial, was as to the true course of the lode or vein. The instructions referred to in the opinion had reference to that question only, which was solely a question of fact; and the court said that no federal question was involved,—that is, that no question was raised which called for any construction of section 2322. The other decisions that we have cited go directly to the point raised in this case. In *Burke* v. *Mining Co.*, 46 Fed. 644, 646, the court said:

"It is claimed on one side, and denied on the other, that this suit, having been brought to determine the title to a mining claim, in pursuance to the requirements of section 2326 of the Revised Statutes, as amended in March, 1881 (1 Supp. Rev. St. p. 609), is for that reason a suit arising under the laws of the United States, within

the meaning of the statute giving jurisdiction on that ground, irrespective of the character of the questions involved in the litigation. It seems to us that all the authorities, as they now stand, have determined the question in favor of the affirmative of this proposition."

In *Jackson* v. *Roby,* 109 U. S. 440, 3 Sup. Ct. 301, which was a suit brought in the circuit court of the United States for the district of Colorado in support of an adverse claim under the provisions of section 2326 of the Revised Statutes, the court disposed of the case upon its merits, and it is certainly fair to assume that it had no doubts as to its jurisdiction in the premises. In *Chambers* v. *Harrington,* 111 U. S. 350, 4 Sup. Ct. 428, it was claimed that a judgment rendered in a suit brought under the provisions of section 2326 of the Revised Statutes was not subject to review in the supreme court. The court said:

"But it is apparent that the statute requires a judicial proceeding in a competent court. What is a competent court is not specifically stated, but it undoubtedly means a court of general jurisdiction, whether it be a state court or a federal court; and as the very essence of the trial is to determine rights by a regular procedure in such court, after the usual methods, which rights are dependent on the laws of the United States, we see no reason why, if the amount in controversy is sufficient in a case tried in a court of the United States, or the proper case is made on a writ of error to a state court, the judgment may not be brought to this court for review, as in other similar cases."

The proceedings required to be commenced, under the provisions of section 2326, in a court of competent jurisdiction, may be brought either in the state or national courts, at law, or in equity, as the facts may warrant; but section 2326 does not confer any special jurisdiction on the state courts. When the suits are brought and tried in the state courts, they are subject to the provisions of the state statutes in relation to such cases, and the courts proceed in the manner prescribed by such statutes. The proceedings in the national courts

are regulated by the provisions of section 2326, as will more fully appear in the consideration of the next question involved herein. In several Pacific coast states, statutes have been passed for the purpose of supplementing the provisions of section 2326, and the cases, when tried in the courts of such states, are controlled by such statutes, independent of any other provisions of the state statutes. *Rose* v. *Mining Co.*, 17 Nev. 25, 52, 27 Pac. 1105; 2 Lindl. Mines, §§ 754, 755, and authorities there cited. In *Steel* v. *Mining Co.*, 18 Nev. 87, 1 Pac. 450, the court said:

"These actions may be brought by the plaintiff, whether he is in or out of possession of the mining ground in controversy; and the only sensible construction of the law is that each party must prove his claim to the premises in dispute, and that the better claim must prevail."

Now, if there were no statute of the state especially providing for the trial of this class of cases, it might be that the state courts would not be able in all cases to try questions required to be heard and determined by section 2326, as amended. But, be that as it may, our conclusion is that, upon reason and authority, the circuit courts of the United States have jurisdiction to hear and determine the respective rights of the parties in controversies arising under the provisions of section 2326, if the property in controversy exceeds in value the sum of $2,000, independent of the question of the citizenship of the respective parties, or of the fact as to whether or not the case presents any federal question involving the construction of any other provision of the laws of the United States. In other words, that a circuit court of the United States is "a court of competent jurisdiction" to try such cases, within the meaning of those words as used in said statute.

2. The next point raised by the demurrer is "that it ap-

pears on the face of the bill that the plaintiff has an adequate remedy at law." The bill, among other things, alleges that the complainants long prior to August 20, 1895, were "ever since have been, and now are the owners (subject only to the paramount title of the United States) and in the possession of that certain mine and mining claim containing a lode of rock in place, bearing silver, lead, and other valuable minerals and metals, situate in Yreka mining district, Shoshone county, state of Idaho, called the 'Kirby Fraction Lode and Mining Claim,'" which is particularly described by metes and bounds; that the defendant, claiming to be the owner of an alleged adjacent mining claim, called the "Shoshone Mining Claim," on or about the ——— day of August, 1895, wrongfully caused said Shoshone mining claim to be so surveyed as to crop upon and overlap the said Kirby Fraction lode mining claim, and to include a portion thereof, which is particularly described in the bill; that on or about the 24th day of August, 1895, the said defendant applied for a United States patent at the proper land office; "that in and by said application for patent the defendant set up and wrongfully alleged that it was the owner and in possession of the whole of said Shoshone mining claim, inclusive of the premises last above described, and of the lode therein, part of the Kirby Fraction lode and mining claim, and the property and in the possession of the complainants." The proceeding required, authorized, and directed by section 2326 of the Revised Statutes has no specific relation whatever to the action of ejectment, or to any other common-law action. The object of the proceeding is the determination of the contest in the land office, as to which of the parties, if either, is entitled to receive a patent from the government,—a right which arises out of a full compliance with the laws of congress for the acquisition of a government patent for mineral lands. The proceedings are purely statutory, and their in-

ception is in the land office, not in the courts where the suit is commenced. As was said in *Wolverton* v. *Nichols,* 119 U. S. 485, 488, 7 Sup. Ct. 289, 291:

"The proceedings in this case commenced by the assertion of the defendants' claim to have a patent issue to them for the land in controversy. The next step was the filing of an adverse claim by the plaintiffs in the land office, and the present suit is but a continuation of those proceedings, prescribed by the laws of the United States to have a determination of the question as to which of the contesting parties is entitled to the patent. The act of congress requires that the certified copy of the judgment of the court shall be filed in the land office, and shall be there conclusive. And we must keep this main purpose of the action in view, in any decision made with regard to the rights of the parties."

Whatever may be said of the nature and character of these proceedings when tried in the state courts, where the statutes have, as to the forms of action, abolished the distinction which exists in the national courts between law and equity, it must, we think, be conceded that such proceedings are of an equitable nature, and, when brought in the national courts, are to be tried as equity cases. The mere fact that in certain cases an action at law has been deemed sufficient does not change the equitable character of the suit. The suit is brought for special relief, and the judgment required to be entered is such as a court exercising jurisdiction in equity alone could render. This is clearly shown by the court in *Hammer* v. *Milling Co.,* 130 U. S. 291, 296, 9 Sup. Ct. 548, where the court, in the course of its opinion, following the views expressed in *Basey* v. *Gallagher,* 20 Wall. 670, 679, said:

"The suitor, whatever relief he may ask, is required to state in ordinary, concise language, the facts of his case, upon which he invokes the judgment of the court; but the consideration which the court will give to the questions raised by the pleadings when the case is called for trial or hearing—whether it will submit them to a jury, or pass upon them without any such intervention—must de-

pend upon the jurisdiction which is to be exercised. If the remedy sought be a legal one, a jury is essential, unless waived by the stipulation of the parties; but, if the remedy sought be equitable, the court is not bound to call a jury, and, if it does call one, it is only for the purpose of enlightening its conscience, and not to control its judgment. The decree which it must render upon the law and the facts must proceed from its own judgment respecting them, and not from the judgment of others. The court might therefore have heard this case and disposed of the issues without the intervention of a jury, but, it having called a jury, the trial was conducted in the same manner as a trial of an issue at law. Such is the practice under the system of procedure in the territory" (of Montana).

The determination of the rights of the parties, as required by section 2326, as we have already said, is not necessarily the subject of a common-law action; and a trial thereof on the equity side of the court is certainly not a violation of the provisions of the constitution, which declares that the right of trial by jury shall be secured to all and remain inviolate forever. The equity jurisdiction of the United States courts is not controlled by state legislation. In *Perego* v. *Dodge*, 163 U. S. 160, 16 Sup. Ct. 971, the court held that the amendatory act of March 3, 1881 (21 Stat. 505), was not intended to require and does not require, all suits brought under section 2326 to be actions at law, and to be tried by a jury. In the course of the opinion, in reference to sections 2325 and 2326, the court said:

"Thus, the determination of the right of possession as between the parties is referred to a court of competent jurisdiction, in aid of the land office, but the form of action is not provided for by the statute; and apparently an action at law or a suit in equity would lie, as either might be appropriate under the particular circumstances,—an action to recover possession when plaintiff is out of possession, and a suit to quiet title when he is in possession."

The courts in this circuit have frequently entertained jurisdiction of suits in equity instituted under the provisions of section 2326. In *Doe* v. *Mining Co.*, 43 Fed. 219, there is

a clear enunciation of the principles applicable to this case, substantially in accord with the views herein stated. That case was affirmed in this court in 17 C. C. A. 190, 70 Fed. 458, 462. In *Preston* v. *Hunter*, 15 C. C. A. 148, 67 Fed. 996, counsel, being in doubt as to whether the suit should be classed as one in equity or an action at law, sent up two transcripts,—one upon appeal, as required in equity suits; the other upon writ of error, as required in actions at law. This court, without any discussion of the question, considered the case as an equity suit. It follows from the views herein expressed that the court did not err in overruling the demurrer to the bill.

3. This brings us to a consideration of the case upon its merits. It appears from the record that appellees first located a claim on a portion of the ground in dispute, under the name of the "Edith Mining Claim," and recorded the same; that thereafter, before any right of the appellant was made to the ground, the locators of the Kirby Fraction mining claim made a location "on top of the Edith," and also included more ground. These locations were made by the same parties. The Edith was located June 10, 1886, embracing 1,200 feet on the lode; the Kirby, on July 11, 1886, claiming 1,400 feet. Jacob Johns, one of the locators, testified that after the location of the Edith he found more ground, "and located another claim right over it. It was all our property, anyhow, so we located over it,—right over the top of the Edith. The location of the Edith was completed before the Kirby was located. * * * I intended to hold both the Edith and Kirby locations." In the conveyances made by the locators, they mentioned the Edith as well as the Kirby claim. Upon these facts appellant contends that, if the Edith location was valid, the Kirby location is void; that the appellees cannot recover upon the Edith title, because they have not set up any title to that claim in their bill; that they

cannot recover upon the Kirby title without showing an abandonment of the Edith location. In considering these questions, it must be remembered that the Kirby was located long prior to the Shoshone claim. The evidence does not show that the ground covered by the Edith location was intended to be abandoned, but it does show that the original locators of the Edith concluded to change the boundaries by adding more ground, and gave a new name to their claim. The locators had the right to do this, as long as they did not interfere with the rights of other parties. The fact that the Edith was mentioned in the conveyances does not prove that the parties relied upon the title under that name. A conveyance of the ground by metes and bounds, by any name of the claim, would be valid and effective. The name is generally used to designate or identify the claim, but it may be designated or identified by the use of one, or more than one, name, if it is known, or called by different names. There is no statute, law, rule, or regulation which prevents locators of mining claims from relocating their own claim, and including additional vacant ground, unclaimed by other parties, under a different name, and conveying it by the designation of the last name. In *Weill* v. *Mining Co.*, 11 Nev. 200, 210, where the facts were in some respects similar to the case in hand, there were two locations made by the same parties, known, respectively, as the "Boston" and the "Lucerne." The Boston was located prior, and the Lucerne subsequent, to the location of the Waller's Defeat, owned by the plaintiff. The question was whether the defendant obtained any title to the Boston ground under a deed conveying the same by the name of the "Lucerne Company's Claims." The court said:

"If the Boston notice and the Lucerne notice were posted upon and claimed the same lode, a conveyance of his interest in the lode necessarily conveyed his interest in both locations, and it was immaterial by what particular name he designated it. *Phillpotts* v. *Blasdel*, 8 Nev. 61."

4. It is next claimed that there was no sufficient discovery made of any mineral, lode, or vein at the time the Kirby claim was located, and that for that reason the Kirby location was absolutely void. Upon this point there is some conflict in the evidence, but the weight and preponderance, in its entirety, clearly shows that at the time the location was made the locators had discovered a vein, or seams of rock in place, bearing minerals. The discovery was made in running a tunnel, where small seams of iron oxide, quartz, and small quantities of carbonate of lead were found, two or three inches wide. These indications were of such character as miners in that district would follow in the expectation of finding ore, and such as would justify miners in working a claim for that purpose. The rock in these seams was different from the country rock, and was of such character as is designated by the witnesses, who were practical miners, "as a vein containing rock in place, bearing minerals." These facts show that the location was made in good faith, and not "simply upon a conjectural or imaginary existence of a vein or lode," which cannot be permitted. *King* v. *Mining Co.,* 152 U. S. 222, 227, 14 Sup. Ct. 510. The seams, containing mineral-bearing earth and rock, which were discovered before the location was made, were similar in their character to the seams or veins of mineral matter that had induced other miners to locate claims in the same district, which by continued developments thereon had resulted in establishing the fact that the seams, as depth was obtained thereon, were found to be a part of a well-defined lode or vein containing ore of great value. The discovery made at the time of the Kirby location was therefore such as to justify a belief as to the existence of such a lode or vein within the limits of the ground located. *Erhardt* v. *Boaro,* 113 U. S. 528, 536, 5 Sup. Ct. 560. The subsequent developments made after the claim was located, and before the location of the Shoshone, show more clearly the existence of

a lode or vein. We are of opinion that the testimony on behalf of appellees is sufficient to show a compliance with the provisions of section 2320, which requires that there must be a discovery of a vein or lode within the limits of the claim before a valid location thereof can be made. In *Book* v. *Mining Co.*, 58 Fed 106, 120, the court, in construing this section of the statute, said:

"The words 'vein or lode,' in the last clause of this statute, were evidently intended to apply to such veins or lodes as were described in the first section, and to have the same meaning, viz.: a vein or lode 'of quartz or other rock in place bearing gold, silver,' etc. This statute was intended to be liberal and broad enough to apply to any kind of a lode or vein of quartz or other rock bearing mineral, in whatever kind, character, or formation the mineral might be found. It should be so construed as to protect locators of mining claims, who have discovered rock in place, bearing any of the precious metals named therein, sufficient to justify the locators in expending their time and money in prospecting and developing the ground located. It must be borne in mind that the veins and lodes are not always of the same character. In some mining districts, the veins, lodes and ore deposits are so well and clearly defined as to avoid any questions being raised. In other localities the mineral is found in seams, narrow crevices, cracks, or fissures in the earth, the precise extent and character of which cannot be fully ascertained until expensive explorations are made, and the continuity of the ore and existence of the rock in place, bearing mineral, is established. It never was intended that the locator of a mining claim must determine all these facts before he would be entitled, under the law, to make a valid location. Every vein or lode is liable to have barren spots and narrow places, as well as rich chimneys and pay chutes, or large deposits of valuable ore. When the locator finds rock in place, containing mineral, he has made a discovery, within the meaning of the statute, whether the rock or earth is rich or poor, whether it assays high or low. It is the finding of the mineral in the rock in place, as distinguished from float rock, that constitutes the discovery, and warrants the prospector in making a location of a mining claim."

See, also, *Migeon* v. *Railway Co.*, 44 U. S. App. 724, 737, 23 C. C. A. 156, and 77 Fed. 249; *McShane* v. *Kenkle*, 18 Mont. 208, 44 Pac. 979; *Bonner* v. *Meikle*, 82 Fed. 697, 703.

The purpose of the statute in requiring that "no location of a mining claim shall be made until the discovery of a vein or lode within the limits of the claim located" was to prevent frauds upon the government by persons attempting to acquire patents to land not mineral in its character. But as was said in *Bonner* v. *Meikle, supra:*

"It was never intended that the court should weigh scales to determine the value of mineral found, as between a prior and subsequent locator of a mining claim, on the same lode."

The location of the Kirby was made in 1886. The discovery of mineral then made was sufficient to induce the locators and their grantees to perform the amount of annual labor thereon as required by the mining laws; to expend their time and money in prosecuting the work thereon, in the belief and expectation of finding ore of profitable value therein. The location of the Shoshone was not made until 1895. There is no good reason why the owners of the Kirby should be deprived of the discoveries made by them in prosecuting the work thereon after the location was made, and prior to the time of the location of the Shoshone claim. The court did not err in admitting the testimony upon this point. *North Noonday M. Co.* v. *Orient M. Co.,* 1 Fed. 522, 531; *Jupiter M. Co.* v. *Bodie M. Co.,* 11 Fed. 666, 676; *Strepey* v. *Stark,* 7 Colo. 614, 5 Pac. 111; *Zollars* v. *Evans,* 5 Fed. 172, 175; *Patchen* v. *Keeley,* 19 Nev. 405, 415; 14 Pac. 347.

5. We have examined the objections made and exceptions taken by appellant to certain rulings of the court at the trial with reference to the annual assessment work done upon the Kirby claim in the years 1895 and 1896, and find no error therein.

6. Another case between the same parties was commenced in the state court, removed to the United States circuit court, and there tried as an equity suit, and, as it involved the title

to the same mining ground, was consolidated, for the purpose of this appeal, with the case above disposed of. In the case brought in the state court, appellant claimed title to the mining ground under the Ibex location. The facts and circumstances as to the location of the Ibex claim are substantially the same as those pertaining to the Shoshone claim. Having arrived at the conclusion that the Kirby claim was a valid location, and it being prior in point of time to the others, it became unnecessary to notice any of the questions raised concerning the Shoshone or Ibex locations. The other questions are the same in both cases.

The decree in each case is affirmed, with costs.

GILBERT, J. filed dissenting opinion confined solely to the point of federal jurisdiction.

[1]DEL MONTE MINING & MILLING CO. v. LAST CHANCE MINING & MILLING CO.

(171 U. S. 55; 18 Sup. Ct. 895. Supreme Court. May 23, 1898.)

By Mexican as well as by English common law surface lines limited the claim to the mineral lying underneath them.

[2]Questions of extralateral rights are to be determined as contentions dependent entirely upon statutory construction and to claim such rights parties must come within the terms of the statute.

Overlapping locations are of constant occurrence, recognized by land office practice and impossible to be avoided under the mineral land laws. On such state of facts the nominal trespass of placing stakes on older claims will not be held to vitiate the claim notwithstanding the rights of the older locator to the exclusive possession of his surface ground.

Setting stakes on and protracting lines across prior claim. Lines of a junior lode location may be laid within, upon, or across the surface of a valid senior location for the purpose of defining for or securing to, such junior location underground extralateral rights not in conflict with any rights of the senior location.

[3]Construction of patent containing excluded areas. In the case of overlapping locations, a patent for the junior location, which first describes the entire rectangular claim by metes and bounds, and then excepts therefrom the premises previously granted to the senior claim, conveys to the patentee greater rights than would a patent specifically describing only the irregular tract lying outside the senior location.

Protracted end lines. An end line starting on clear ground, which is cut off as a surface boundary by reaching ground of an older patent, but protracted across or upon such patent to find a corner, continues to be an end line and is to be protracted on its downward course to define the extralateral rights of a lode claimant following a vein on its dip.

[4]General conclusions of the court. (1) The location as made on the surface by the locator determines the extent of rights below the

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[1]Case in equity concerning same property. *Del Monte Co.* v. *New York Co.* 18 M. R. 188.

[2]*Duggan* v. *Davey*, 17 M. R. 59.

[3]*Montana Co.* v. *Boston Co.* 19 M. R. 186.

[4]Where plaintiff recovered judgment, giving it extralateral rights

surface. (2) The end lines as he marks them on the surface define his limitations on the strike of the lode. (3) Any vein apexing within the surface lines he may follow extralaterally, except where the location is not along, but across, the course of the vein.

Question too general. The supreme court will not answer a question put in such form as to require a decision of the whole case.

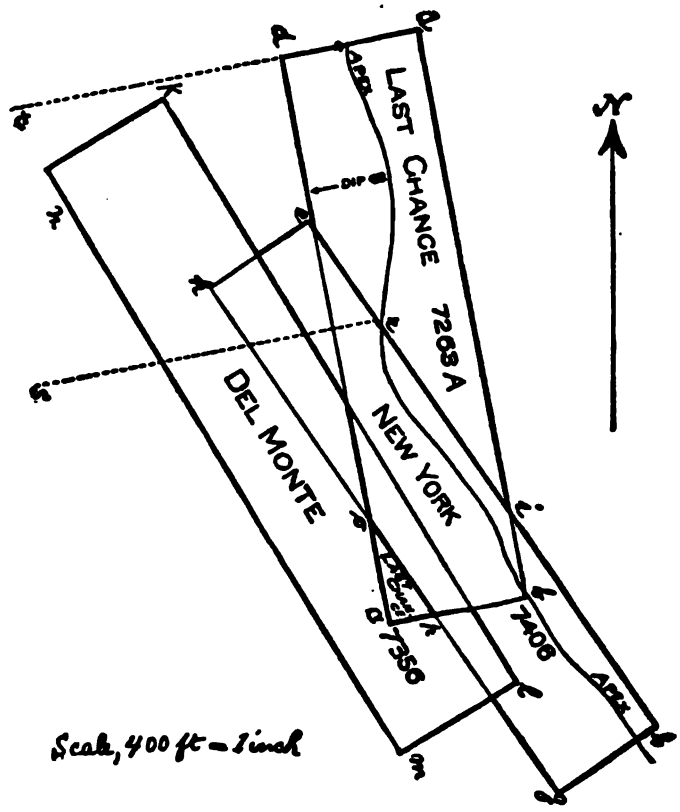
On a Certificate from the United States Circuit Court of Appeals for the Eighth Circuit.

This case is before this court on questions certified by the court of appeals for the eighth circuit. The facts stated are as follows: The appellant is the owner in fee of the Del Monte lode mining claim, located in the Sunnyside mining district, Mineral county, Colo., for which it holds a patent bearing date February 3, 1894, pursuant to an entry made at the local land office on February 27, 1893. The appellee is the owner of the Last Chance lode mining claim, under patent dated July 5, 1894, based on an entry of March 1, 1894. The New York lode mining claim, which is not owned by either of the parties, was patented on April 5, 1894, upon an entry of August 26, 1893. The relative situation of these claims, as well as the course and dip of the vein, which is the subject of controversy, is shown on the following diagram:

and the defendant continues to work on alleged new ground, the case to test the question is by contempt on the original injunction and not by a new bill to quiet title. *Montana Co.* v. *Boston Co.* 27 Mont. 410; 71 Pac. 403.

The presumption that the holder of a location owns everything within his lines, yields upon proof of an apex outside so located as to have extralateral rights. *Montana Co.* v. *Boston Co.* 27 Mont. 288; 22 M. R. —.

The fact that before plaintiff's location defendant had stoped out ore at a point where the plaintiff's extralateral rights reach, does not destroy plaintiff's extralateral rights to the vein below. *Davis* v. *Shepherd*, (Colo.) 72 Pac. 57; 22 M. R. —.



Both in location and patent the Del Monte claim is first in time, the New York second, and the Last Chance third. When the owners of the Last Chance claim applied for their patent, proceedings in adverse were instituted against them by the owners of the New York claim, and an action in support of such adverse was brought in the United States circuit court for the district of Colorado. This action terminated in favor of the owners of the New York and against the owners of the Last Chance, and awarded the territory in conflict between the two locations to the New York claim. The ground in conflict between the New York and Del Monte,

except so much thereof as was also in conflict between the Del Monte and Last Chance locations, is included in the patent to the Del Monte claim. The New York secured a patent to all of its territory except that in conflict with the Del Monte, and the Last Chance in turn secured a patent to all of its territory except that in conflict with the New York, in which last-named patent was included the triangular surface conflict between the Del Monte and Last Chance, which, by agreement, was patented to the latter. The Last Chance claim was located upon a vein, lode, or ledge of silver and lead bearing ore, which crosses its north end line and continues southerly from that point through the Last Chance location until it reaches the eastern side line of the New York, into which latter territory it enters, continuing thence southerly with a southeasterly course on the New York claim until it crosses its south end line. No part of the apex of the vein is embraced within the small triangular parcel of ground in the southwest corner of the Last Chance location which was patented to the Last Chance as aforesaid, and no part of the apex is within the surface boundaries of the Del Monte mining claim. The portion of the vein in controversy is that lying under the surface of the Del Monte claim, and between two vertical planes; one drawn through the north end line of the Last Chance claim extending westerly, and the other parallel thereto, and starting at the point where the vein leaves the Last Chance and enters the New York claim, as shown on the foregoing diagram. Upon these facts the following questions have been certified to us:

"(1) May any of the lines of a junior lode location be laid within, upon, or across the surface of a valid senior location for the purpose of defining for or securing to such junior location underground or extralateral rights not in conflict with any rights of the senior location?

"(2) Does the patent of the Last Chance lode mining claim which first describes the rectangular claim by metes and

bounds, and then excepts and excludes therefrom the premises previously granted to the New York lode mining claim, convey to the patentee anything more than he would take by a grant specifically describing only the two irregular tracts which constitute the granted surface of the Last Chance claim?

"(3) Is the easterly side of the New York lode mining claim an 'end line' of the Last Chance lode mining claim, within the meaning of sections 2320 and 2322 of the Revised Statutes of the United States?

"(4) If the apex of a vein crosses one end line and one side line of a lode mining claim, as located thereon, can the locator of such vein follow it upon its dip beyond the vertical side line of his location?

"(5) On the facts presented by the record herein, has the appellee the right to follow its vein downward beyond its west side line, and under the surface of the premises of appellant?"

C. S. THOMAS, W. H. BRYANT and H. H. LEE, for Del Monte M. & M. Co.

JOEL F. VAILE and E. O. WOLCOTT, for Last Chance M. & M. Co.

Mr Justice BREWER, after stating the case, delivered the opinion of the court.

The questions thus presented are not only important, but difficult, involving as they do the construction of the statutes of the United States in respect to mining claims. As leading up to a clearer understanding of those statutes, it may be well to notice the law in existence prior thereto. The general rule of the common law was that whoever had the fee of the soil owned all below the surface, and this common law is the general law of the states and territories of the United States,

and, in the absence of specific statutory provisions or contracts, the simple inquiry as to the extent of mining rights would be, who owns the surface? Unquestionably, at common law the owner of the soil might convey his interest in mineral beneath the surface without relinquishing his title to the surface, but the possible fact of a separation between the ownership of the surface and the ownership of mines beneath that surface, growing out of contract, in no manner abridged the general proposition that the owner of the surface owned all beneath. It is said by Lindley, in his work on Mines (volume 1, § 4), that in certain parts of England and Wales so-called local customs were recognized which modified the general rule of the common law, but the existence of such exceptions founded upon such local customs only accentuates the general rule. The Spanish and Mexican mining law confined the owner of a mine to perpendicular lines on every side. *Mining Co.* v. *Tarbet,* 98 U. S. 463, 468; 1 Lindl. Mines, § 13. The peculiarities of the Mexican law are discussed by Lindley at some length in the section referred to. It is enough here to notice the fact that by the Mexican as by the common law the surface rights limited the rights below the surface.

In the acquisition of foreign territory since the establishment of this government the great body of the land acquired became the property of the United States, and is known as their "public lands." By virtue of this ownership of the soil the title to all mines and minerals beneath the surface was also vested in the government. For nearly a century there was practically no legislation on the part of congress for the disposal of mines or mineral lands. The statute of July 26, 1866, c. 262, 14 Stat. 251, was the first general statute providing for the conveyance of mines or minerals. Previous to that time it is true that there had been legislation respecting leases of mines, as, for instance, the act of March 3, 1807, c. 49, § 5, 2 Stat. 448, 449, which authorized the presi-

dent to lease any lead mine in the Indiana Territory for a term not exceeding five years; and acts providing for the sale of lands containing lead mines in special districts, act of March 3, 1829, c. 55, 4 Stat. 364; act of July 11, 1846, c. 36, 9 Stat. 37; act of March 1, 1847, c. 32, 9 Stat. 146; act of March 3, 1847, c. 54, 9 Stat. 179; also such legislation as is found in the act of February 27, 1865, c. 64, 13 Stat. 440, providing for a district and circuit court for the district of Nevada, in which it was said, in section 9: "That no possessory action between individuals in any of the courts of the United States for the recovery of any mining title, or for damages to any such title, shall be affected by the fact that the paramount title to the land on which such mines are, is in the United States, but each case shall be adjudged by the law of possession;" that of May 5, 1866, c. 73, 14 Stat. 43, concerning the boundaries of the state of Nevada, which proviled that "all possessory rights acquired by citizens of the United States to mining claims, discovered, located, and originally recorded in compliance with the rules and regulations adopted by miners in the Pah-Ranagat and other mining districts in the territory incorporated by the provisions of this act into the state of Nevada shall remain as valid subsisting mining claims; but nothing herein contained shall be so construed as granting a title in fee to any mineral lands held by possessory titles in the mining states and territories;" and the act of July 25, 1866, c. 244, 14 Stat. 242, which, granting to A. Sutro and his assigns certain privileges to aid in the construction of a tunnel, conferred upon the grantees the right of preemption of lodes within 2,000 feet on each side of said tunnel. Two laws were also passed regulating the sale and disposal of coal lands; one on July 1, 1864, c. 205 and one on March 3, 1865, c. 107, 13 Stat. 343, 529.

Notwithstanding that there was no general legislation on the part of Congress, the fact of explorers searching the public domain for mines, and their possessory rights to the mines by them discovered, was generally recognized, and the rules

and customs of miners in any particular district were enforced as valid. As said by this court in *Sparrow* v. *Strong*, 3 Wall. 97, 104: "We know, also, that the territorial legislature has recognized by statute the validity and binding force of the rules, regulations, and customs of the mining districts. And we cannot shut our eyes to the public history, which informs us that under this legislation and not only without interference by the national government, but under its implied sanction, vast mining interests have grown up, employing many millions of capital, and contributing largely to the prosperity and improvement of the whole country." See, also, *Forbes* v. *Gracey*, 94 U. S. 762; *Jennison* v. *Kirk*, 98 U. S. 453, 459; *Broder* v. *Water Co.*, 101 U. S. 274, 276; *Manuel* v. *Wulff*, 152 U. S. 505, 510, 14 Sup. Ct. 651; *Black* v. *Mining Co.*, 163 U. S. 445, 449, 16 Sup. Ct. 1101.

The act of 1866 was, however, as we have said, the first general legislation in respect to the disposal of mines. The first section provided: "That the mineral lands of the public domain, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and occupation by all citizens of the United States, and those who have declared their intention to become citizens, subject to such regulations as may be prescribed by law, and subject also to the local customs or rules of miners in the several mining districts, so far as the same may not be in conflict with the laws of the United States."

The second section gave to a claimant of a vein or lode of quartz, or other rock in place, bearing gold, etc., the right "to file in the local land office a diagram of the same, * * * and to enter such tract and receive a patent therefor, granting such mine, together with the right to follow such vein or lode with its dips, angles and variations, to any depth, although it may enter the land adjoining, which land adjoining shall be sold subject to this condition." The purpose here manifested was the conveyance of the vein, and not the conveyance of a certain area of land within which was a

vein. Section 3, which set forth the steps necessary to be taken to secure a patent, and required the payment of five dollars per acre for the land conveyed, added: "But said plat, survey, or description shall in no case cover more than one vein or lode, and no patent shall issue for more than one vein or lode, which shall be expressed in the patent issued." Nowhere was there any express limitation as to the amount of land to be conveyed, the provision in section 4 being: "That no location hereafter made shall exceed two hundred feet in length along the vein for each locator, with an additional claim for discovery to the discoverer of the lode, with the right to follow such vein to any depth, with all its dips, variations, and angles, together with a reasonable quantity of surface for the convenient working of the same as fixed by local rules: *And provided further,* That no person may make more than one location on the same lode, and not more than three thousand feet shall be taken in any one claim by any association of persons." Obviously the statute contemplated the patenting of a certain number of feet of the particular vein claimed by the locator, no matter how irregular its course, made no provision as to the surface area or the form of the surface location, leaving the land department in each particular case to grant so much of the surface as was "fixed by local rules," or was, in the absence of such rules, in its judgment, necessary for the convenient working of the mine. The party to whom the vein was thus patented was permitted to follow it on its dip to any extent, although thereby passing underneath lands to which the owner of the vein had no title.

As might be expected, the patents issued under this statute described surface areas very different, and sometimes irregular in form. Often they were like a broom, there being around the discovery shaft an amount of ground deemed large enough for the convenient working of the mine, and a narrow strip extending therefrom as the handle of the broom. This strip might be straight or in a curved or irregular line, fol-

lowing, as was supposed, the course of the vein. Sometimes the surface claimed and patented was a tract of considerable size, so claimed with the view of including the apex of the vein, in whatever direction subsequent explorations might show it to run. And again, where there were local rules giving to the discoverer of a mine possessory rights in a certain area of surface, the patent followed those rules and conveyed a similar area. Even under this statute, although its express purpose was primarily to grant the single vein, yet the rights of the patentee beneath the surface were limited and controlled by his rights upon the surface. If, in fact, as shown by subsequent explorations, the vein on its course or strike, departed from the boundary lines of the surface location, the point of departure was the limit of right. In other words, he was not entitled to the claimed and patented number of feet of the vein, irrespective of the question whether the vein in its course departed from the lines of the surface location.

The litigation in respect to the Flagstaff Mine in Utah illustrates this. There was a local custom giving to the locator of a mine 50 feet in width on either side of the course of the vein, and the Flagstaff patent granted a superficies 100 feet wide by 2,600 feet long, with the right to follow the vein described therein to the extent of 2,600 feet. It turned out that the vein, instead of running through this parallelogram lengthwise, crossed the side lines, so that there was really but 100 feet of the length of the vein within the surface area. On either side of the Flagstaff ground were other locations, through which the vein, on its course, passed. As against these two locations the owners of the Flagstaff claimed the right to follow the vein on its course or strike to the full extent of 2,600 feet. This was denied by the supreme court of Utah. *McCormick* v. *Varnes,* 2 Utah, 355. In that case the controversy was with the location on the west of the Flagstaff. The decision of that court in respect

to the controversy with the location on the east of the Flagstaff is not reported, but the case came to this court. *Mining Co.* v. *Tarbet,* 98 U. S. 463. In the course of the opinion (pages 467, 468) it was said:

"It was not the intent of the law to allow a person to make his location crosswise of a vein, so that the side lines shall cross it, and thereby give him the right to follow the strike of the vein outside of his side lines. That would subvert the whole system sought to be established by the law. If he does locate his claim in that way, his rights must be subordinated to the rights of those who have properly located on the lode. Their right to follow the dip outside of their side lines cannot be interfered with by him. His right to the lode only extends to so much of the lode as his claim covers. If he has located crosswise of the lode, and his claim is only one hundred feet wide, that one hundred feet is all he has a right to."

These decisions show that, while the express purpose of the statute was to grant the vein for so many feet along its course, yet such grant could only be made effective by a surface location covering the course to such extent. This act of 1866 remained in force only six years, and was then superseded by the act of May 10, 1872, c. 152, 17 Stat. 91, found in the Revised Statutes, sections 2319 and following. This is the statute which is in force to-day, and under which the controversies in this case arise. Section 2319, Rev. St. (corresponding to section 1 of the act of 1872), reads:

"All valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the

same are applicable and not inconsistent with the law of the United States."

It needs no argument to show that, if this were the only section bearing upon the question, patents for land containing mineral would, except in cases affected by local customs and rules of miners, be subject to the ordinary rules of the common law, and would convey title to only such minerals as were found beneath the surface. We therefore turn to the following sections to see what extralateral rights are given, and upon what conditions they may be exercised. And it must be borne in mind in considering the questions presented that we are dealing simply with statutory rights. There is no showing of any local customs or rules affecting the rights defined in and prescribed by the statute, and beyond the terms of the statute courts may not go. They have no power of legislation. They cannot assume the existence of any natural equity, and rule that by reason of such equity a party may follow a vein into the territory of his neighbor, and appropriate it to his own use. If cases arise for which Congress has made no provision, the courts cannot supply the defect. Congress having prescribed the conditions upon which extralateral rights may be acquired, a party must bring himself within those conditions, or else be content with simply the mineral beneath the surface of his territory. It is undoubtedly true that the primary thought of the statute is the disposal of the mines and minerals, and in the interpretation of the statute this primary purpose must be recognized, and given effect. Hence, whenever a party has acquired the title to ground within whose surface area is the apex of a vein with a few or many feet along its course or strike, a right to follow that vein on its dip for the same length ought to be awarded to him if it can be done, and only if it can be done, under any fair and natural construction of the language of the statute. If the surface of the ground was everywhere level, and veins constantly pursued a straight line,

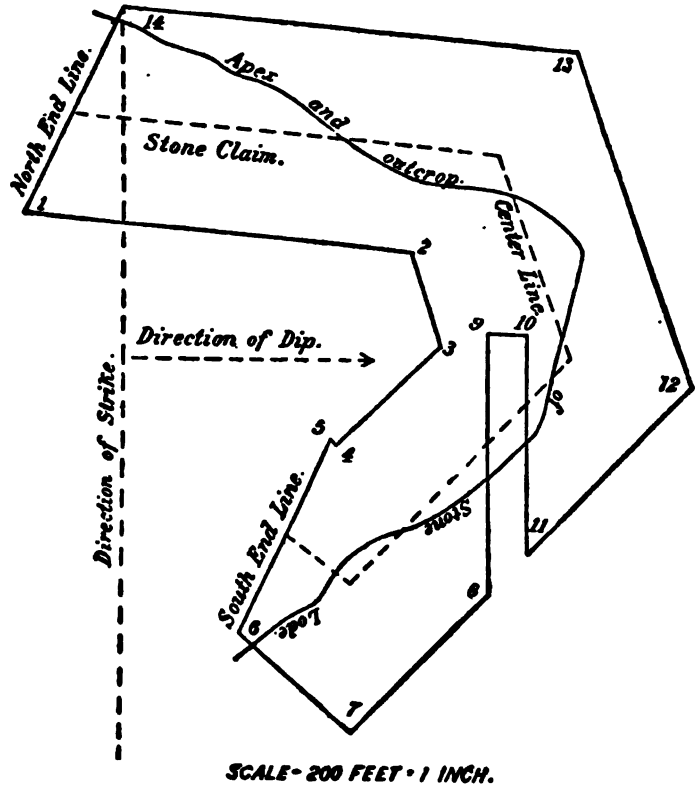
there would be little difficulty in legislation to provide for all contingencies; but mineral is apt to be found in mountainous regions where great irregularity of surface exists, and the course or strike of the veins is as irregular as the surface, so that many cases may arise in which statutory provisions will fail to secure to a discoverer of a vein such an amount thereof as equitably it would seem he ought to receive. We make these observations because we find in some of the opinions assertions by the writers that they have devised rules which will work out equitable solutions of all difficulties. Perhaps those rules may have all the virtues which are claimed for them, and, if so, it were well if Congress could be persuaded to enact them into statute; but, be that as it may, the question in the courts is not what is equity, but what saith the statute. Thus, for instance, there is no inherent necessity that the end lines of a mining claim should be parallel, yet the statute has so specifically prescribed. (Section 2320.) It is not within the province of the courts to ignore such provision, and hold that a locator, failing to comply with its terms, has all the rights, extralateral and otherwise, which he would have been entitled to if he had complied; and so it has been adjudged. *Iron Silver M. Co.* v. *Elgin M. & S. Co.,* 118 U. S. 196, 6 Sup. Ct. 1177.

This case, which is often called the "Horseshoe Case," on account of the form of the location, is instructive. The diagram on page 383 which was in the record in that case, illustrates the scope of the decision:

The locator claimed in his application for a patent the lines 1, 14, and 5, 6, as the end lines of his location, and, because of their parallelism, that he had complied with the letter of the statute; but the court ruled against him, saying in the opinion (page 208):

"The exterior lines of the Stone claim formed a curved figure somewhat in the shape of a horseshoe, and its end lines are not and cannot be made parallel. What are marked on

the plat as end lines, are not such. The one between numbers 5 and 6 is a side line. The draftsman or surveyor seems to have hit upon two parallel lines of his nine-sided figure, and apparently for no other reason than their parallelism called them end lines.



"We are therefore of opinion that the objection that, by reason of the surface form of the Stone claim, the defendant could not follow the lode existing therein in its downward course beyond the lines of the claim, was well taken to the offered proof."

It is true, the court also observed that, if the two lines named by the locator were to be considered the end lines, no part of the vein in controversy fell "within vertical planes drawn down through those lines continued in their own direction." But, notwithstanding this observation, the point of the decision was that the lines which were the end lines of the location as made on the surface of the ground were not parallel, and that this defect could not be obviated by calling that which was in fact a side line an end line. This is made more clear by the observations of the chief justice, who, with Mr. Justice Bradley, dissented, in which he said:

"I cannot agree to this judgment. In my opinion, the end lines of a mining location are to be projected parallel to each other and crosswise of the general course of the vein within the surface limits of the location, and whenever the top or apex of the vein is found within the surface lines extended vertically downward, the vein may be followed outside of the vertical side lines. The end lines are not necessarily those which are marked on the map as such, but they may be projected at the extreme points where the apex leaves the location as marked on the surface."

In other words, the court took the location as made on the surface by the locator, determined from that what were the end lines, and made those surface end lines controlling upon his rights; and rejected the contention that it was proper for the court to ignore the surface location, and create for the locator a new location whose end lines should be crosswise of the general course of the vein as finally determined by explorations. That this decision and that in the *Tarbet Case, supra,* were correct expositions of the statute, and correctly comprehended the intent of Congress therein, is evident from the fact that, although they were announced in 1885 and 1878, respectively, Congress has not seen fit to change the language of the statute, or in any manner to indicate that

any different measure of rights should be awarded to a mining locator.

With these preliminary observations, we pass to a consideration of the questions propounded. The first is:

"May any of the lines of a junior lode location be laid within, upon, or across the surface of a valid senior location for the purpose of defining for or securing to such junior location underground or extralateral rights not in conflict with any rights of the senior location?"

By section 2319, quoted above, the mineral deposits which are declared to be open to exploration and purchase are those found in lands belonging to the United States, and such lands are the only ones open to occupation and purchase. While this is true, it is also true that until the legal title has passed the public lands are within the jurisdiction of the land department, and, although equitable rights may be established, Congress retains a certain measure of control. *Michigan Land & Lumber Co.* v. *Rust,* 168 U. S. 589, 18 Sup. Ct. 208. The grant is, as is often said, in process of administration. Passing to section 2320, beyond the recognition of the governing force of customs and regulations and a declaration as to the extreme length and width of a mining claim it is provided that: "No location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located. * * * The end lines of each claim shall be parallel to each other."

Section 2322 gives to the locators of all mining locations, so long as they comply with laws of the United States, and with state, territorial, and local regulations not in conflict therewith, "the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in

their course downward as to extend outside the vertical side lines of such surface locations. But their right of possession of such outside parts of such veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward as above described, through the end lines of their locations, so continued in their own direction that such planes will intersect such exterior parts of such veins or ledges. And nothing in this section shall authorize the locator or possessor of a vein or lode which extends in its downward course beyond the vertical lines of his claim to enter upon the surface of a claim owned or possessed by another."

Section 2324 in terms authorizes "the miners of each mining district to make regulations not in conflict with the laws of the United States, or with the laws of the state or territory in which the district is situated, governing the location, manner of recording, amount of work necessary to hold possession of a mining claim, subject to the following requirements: The location must be distinctly marked on the ground so that its boundaries can be readily traced. All records of mining claims hereafter made shall contain the name or names of the locators, the date of the location, and such a description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim. On each claim located after the tenth day of May eighteen hundred and seventy-two, and, until a patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year. On all claims located prior to the tenth day of May, eighteen hundred and seventy-two, ten dollars' worth of labor shall be performed or improvements made by the tenth day of June, eighteen hundred and seventy-four, and each year thereafter, for each one hundred feet in length along the vein, until a patent has been issued therefor; but where such claims are held in common, such expenditure may be made upon any one claim; and upon a failure

to comply with these conditions, the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made, provided that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location."

Section 2325 provides for the issue of a patent. It reads:

"A patent for any land claimed and located for valuable deposits may be obtained in the following manner: Any person, association, or corporation authorized to locate a claim under this chapter, having claimed and located a piece of land for such purposes, who has, or have, complied with the terms of this chapter, may file in the proper land office an application for a patent, under oath, showing such compliance, together with a plat and field-notes of the claim or claims in common, made by or under the direction of the United States surveyor-general, showing accurately the boundaries of the claim or claims, which shall be distinctly marked by monuments on the ground, and shall post a copy of such plat, together with a notice of such application for a patent, in a conspicuous place on the land embraced in such plat previous to the filing of the application for a patent, and shall file an affidavit of at least two persons that such notice has been duly posted, and shall file a copy of the notice in such land office, and shall thereupon be entitled to a patent for the land, in the manner following: The register of the land office, upon the filing of such application, plat, field-notes, notices, and affidavits, shall publish a notice that such application has been made, for the period of sixty days in a newspaper to be by him designated as published nearest to such claim; and he shall also post such notice in his office for the same period. The claimant, at the time of filing this application, or at any time thereafter, within the sixty days of publication, shall file with the register a certificate of the United States surveyor-general that five hundred dollars'

worth of labor has been expended or improvements made upon the claim by himself or grantors; that the plat is correct, with such further description by such reference to natural objects or permanent monuments as shall identify the claim, and furnish an accurate description, to be incorporated in the patent. At the expiration of the sixty days of publication the claimant shall file his affidavit, showing that the plat and notice have been posted in a conspicuous place on the claim during such period of publication. If no adverse claim shall have been filed with the register and the receiver of the proper land office at the expiration of the sixty days of publication, it shall be assumed that the applicant is entitled to a patent, upon the payment to the proper officer of five dollars per acre, and that no adverse claim exists and thereafter no objection from third parties to the issuance of a patent shall be heard except it be shown that the applicant has failed to comply with the terms of this chapter."

Section 2326 is as follows:

"Where an adverse claim is filed during the period of publication it shall be upon oath of the person or persons making the same, and shall show the nature, boundaries, and extent of such adverse claim, and all proceedings, except the publication of notice and making and filing of the affidavit thereof, shall be stayed until the controversy shall have been settled or decided by a court of competent jurisdiction, or the adverse claim waived. It shall be the duty of the adverse claimant, within thirty days after filing his claim, to commence proceedings in a court of competent jurisdiction to determine the question of the right of possession, and prosecute the same with reasonable diligence to final judgment; and a failure to do so shall be a waiver of his adverse claim. After such judgment shall have been rendered, the party entitled to the possession of the claim, or any portion thereof, may, without giving further notice, file a certified copy of the judgment roll with the register of the

land office, together with the certificate of the surveyor-general that the requisite amount of labor has been expended or improvements made thereon, and the description required in other cases, and shall pay to the receiver five dollars per acre for his claim, together with the proper fees, whereupon the whole proceedings and the judgment roll shall be certified by the register to the commissioner of the general land office, and a patent shall issue thereon for the claim, or such portion thereof, as the applicant shall appear, from the decision of the court, to rightly possess. If it appears from the decision of the court that several parties are entitled to separate and different portions of the claim, each party may pay for his portion of the claim, with the proper fees, and file the certificate and description by the surveyor-general, whereupon the register shall certify the proceedings and judgment roll to the commissioner of the general land office, as in the preceding case, and patents shall issue to the several parties according to their respective rights. Nothing herein contained shall be construed to prevent the alienation of the title conveyed by a patent for a mining claim to any person whatever."

These are the only provisions of the statute which bear upon the question presented.

The stress of the argument in favor of a negative answer to this question lies in the contention that by the terms of the statute exclusive possessory rights are granted to the locator. Section 2322 declares that the locators "shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations," and negatively that "nothing in this section shall authorize the locator or possessor of a vein or lode which extends in its downward course beyond the vertical lines of his claim to enter upon the surface of a claim owned or possessed by another." Hence it is said that affirmatively and negatively is it provided that the locator shall have exclusive possession of the surface, and

that no one shall have a right to disturb him in such possession. How, then, it is asked, can any one have a right to enter upon such location for the purpose of making a second location? If he does so, he is a trespasser, and it cannot be presumed that Congress intended that any rights should be created by a trespass.

We are not disposed to undervalue the force of this argument, and yet are constrained to hold that it is not controlling. It must be borne in mind that the location is the initial step taken by the locator to indicate the place and extent of the surface which he desires to acquire. It is a means of giving notice. That which is located is called in section 2320 and elsewhere a "claim" or a "mining claim." Indeed, the words "claim" and "location" are used interchangeably. This location does not come at the end of the proceedings, to define that which has been acquired after all contests have been adjudicated. The location, the mere making of a claim, works no injury to one who has acquired prior rights. Some confusion may arise when locations overlap each other, and include the same ground, for then the right of possession becomes a matter of dispute, but no location creates a right superior to any previous valid location. And these possessory rights have always been recognized and disputes concerning them settled in the courts.

It will also be noticed that the locator is not compelled to follow the lines of the government surveys, or to make his location in any manner correspond to such surveys. The location may, indeed, antedate the public surveys; but, whether before or after them, the locator places his location where, in his judgment, it will cover the underlying vein. The law requires that the end lines of the claim shall be parallel. It will often happen that locations which do not overlap are so placed as to leave between them some irregular parcel of ground. Within that, it being no more than one locator is entitled to take, may be discovered a mineral vein, and the dis-

coverer desire to take the entire surface, and yet it be impossible for him to do so, and make his end lines parallel, unless for the mere purposes of location, he be permitted to place those end lines on territory already claimed by the prior locators.

Again, the location upon the surface is not made with the view of getting benefits from the use of that surface. The purpose is to reach the vein which is hidden in the depths of the earth, and the location is made to measure rights beneath the surface. The area of surface is not the matter of moment. The thing of value is the hidden mineral below, and each locator ought to be entitled to make his location so as to reach as much of the unappropriated, and perhaps only partially discovered and traced, vein, as is possible.

Further, Congress has not prescribed how the location shall be made. It has simply provided that it "must be distinctly marked on the ground, so that its boundaries can be readily traced," leaving the details, the manner of marking, to be settled by the regulations of each mining district. Whether such location shall be made by stone posts at the four corners, or by simply wooden stakes, or how many such posts or stakes shall be placed along the sides and ends of the location, or what other matter of detail must be pursued in order to perfect a location, is left to the varying judgments of the mining districts. Such locations, such markings on the ground, are not always made by experienced surveyors. Indeed, as a rule, it has been and was to be expected that such locations and markings would be made by the miners themselves,—men inexperienced in the matter of surveying, and so, in the nature of things, there must frequently be disputes as to whether any particular location was sufficiently and distinctly marked on the surface of the ground. Especially is this true in localities where the ground is wooded or broken. In such localities the posts, stakes, or other particular marks required by the rules and regulations of the mining district may be

placed in and upon the ground, and yet, owing to the fact that it is densely wooded, or that it is very broken, such marks may not be perceived by the new locator, and his own location marked on the ground in ignorance of the existence of any prior claim. And in all places posts, stakes, or other monuments, although sufficient at first, and clearly visible, may be destroyed or removed, and nothing remain to indicate the boundaries of the prior location. Further, when any valuable vein has been discovered, naturally many locators hurry to seek by early locations to obtain some part of that vein, or to discover and appropriate other veins in that vicinity. Experience has shown that around any new discovery there quickly grows up what is called a mining camp, and the contiguous territory is prospected, and locations are made in every direction. In the haste of such locations, the eagerness to get a prior right to a portion of what is supposed to be a valuable vein, it is not strange that many conflicting locations are made; and, indeed, in every mining camp where large discoveries have been made locations in fact overlap each other again and again. *McEvoy* v. *Hyman,* 25 Fed. 596, 600. This confusion and conflict is something which must have been expected, foreseen; something which, in the nature of things, would happen, and the legislation of Congress must be interpreted in the light of such foreseen contingencies.

Still again, while a location is required by the statute to be plainly marked on the surface of the ground, it is also provided in section 2324 that, upon a failure to comply with certain named conditions, the claim or mine shall be open to relocation. Now, although a locator finds distinctly marked on the surface a location, it does not necessarily follow therefrom that the location is still valid and subsisting. On the contrary, the ground may be entirely free for him to make a location upon. The statute does not provide, and it cannot be contemplated, that he is to wait until by judicial proceedings it has become established that the prior location is in-

valid, or has failed, before he may make a location. He ought to be at liberty to make his location at once, and thereafter, in the manner provided in the statute, litigate, if necessary, the validity of the other as well as that of his own location.

Congress has, in terms, provided for the settlement of disputes and conflicts, for by section 2325, when a locator makes application for a patent (thus seeking to have a final determination by the land department of his title), he is required to make publication and give notice so as to enable any one disputing his claim to the entire ground within his location to know what he is seeking, and any party disputing his right to all or any part of the location may institute adverse proceedings. Then, by section 2326, proceedings are to be commenced in some appropriate court, and the decision of that court determines the relative rights of the parties. And the party who, by that judgment, is shown to be "entitled to the possession of the claim, or any portion thereof," may present a certified copy of the judgment roll to the proper land officers and obtain a patent "for the claim, or such portion thereof, as the applicant shall appear, from the decision of the court, to rightfully possess." And that the claim may be found to belong to different persons, and that the right of each to a portion may be adjudicated, is shown by a subsequent sentence in that same section, which provides that, "if it appears from a decision of the court that several parties are entitled to separate and different portions of the claim, each party may pay for his portion of the claim, * * * and patents shall issue to the several parties according to their respective rights." So it distinctly appears that, notwithstanding the provision in reference to the rights of the locators to the possession of the surface ground within their locations, it was perceived that locations would overlap, that conflicts would arise, and a method is provided for the adjustment of such disputes. And this, too, it must be borne in mind is a statu-

tory provision for the final determination, and is supplementary to that right to enforce temporary possession, which, in accordance with the rules and regulations of mining districts, has always been recognized.

This question is not foreclosed by any decisions of this court, as suggested by counsel. It is true, there is language in some opinions which, standing alone, seems to sustain the contention. Thus, in *Belk* v. *Meagher,* 104 U. S. 279, 284, it is said:

"Mining claims are not open to relocation until the rights of a former locator have come to an end. A relocator seeks to avail himself of mineral in the public lands which another has discovered. This he cannot do until the discoverer has in law abandoned his claim, and left the property open for another to take up. The right of location upon the mineral lands of the United States is a privilege granted by Congress, but it can only be exercised within the limits prescribed by the grant. A location can only be made where the law allows it to be done. Any attempt to go beyond that will be of no avail. Hence a relocation on lands actually covered at the time by another valid and subsisting location is void; and this not only against the prior locator, but all the world, because the law allows no such thing to be done."

And again, in *Gwillim* v. *Donnellan,* 115 U. S. 45, 49, 5 Sup. Ct. 1112:

"A valid and subsisting location of mineral lands, made and kept up in accordance with the provisions of the statutes of the United States, has the effect of a grant by the United States of the right of present and exclusive possession of the lands located. If, when one enters on land to make a location, there is another location in full force, which entitles its owner to the exclusive possession of the land, the first location operates as bar to the second."

The question presented in each of those cases was whether a second location is effectual to appropriate territory covered

by a prior subsisting and valid location, and it was held it is not. Of the correctness of those decisions there can be no doubt. A valid location appropriates the surface, and the rights given by such location cannot, so long as it remains in force, be disturbed by any acts of third parties. Whatever rights on or beneath the surface passed to the first locator can in no manner be diminished or affected by a subsequent location. But that is not the question here presented. Indeed, the form in which it is put excludes any impairment or disturbance of the substantial rights of the prior locator. The question is whether the lines of a junior lode location may be laid upon a valid senior location for the purpose of defining or securing "underground or extralateral rights not in conflict with any rights of the senior location." In other words, in order to comply with the statute, which requires that the end lines of a claim shall be parallel, and in order to secure all the unoccupied surface to which it is entitled, with all the underground rights which attach to possession and ownership of the surface, may a junior locator place an end line within the limits of a prior location?

In that aspect of the question the decisions referred to, although the language employed is general and broad, do not sustain the contention of counsel. This distinction is recognized in the text-books. Thus, in 1 Lindl. Mines, § 363, the author says:

"As a mining location can only be carved out of the unappropriated public domain, it necessarily follows that a subsequent locator may not invade the surface territory of his neighbors, and include within his boundaries any part of a prior valid and subsisting location. But conflicts of surface area are more than frequent. Many of them arise from honest mistake, others from premeditated design. In both instances the question of priority of appropriation is the controlling element which determines the rights of the parties. Two locations cannot legally occupy the same space at the

same time. These conflicts sometimes involve a segment of the same vein on its strike; at others they involve the dip bounding planes underneath the surface. More frequently, however, they pertain to mere overlapping surfaces. The same principles of law apply with equal force to all classes of cases. Such property rights as are conferred by a valid prior location, so long as such location remains valid and subsisting, are preserved from invasion, and cannot be infringed or impaired by subsequent locators. To the extent, therefore, that a subsequent location includes any portion of the surface lawfully appropriated and held by another, to that extent such location is void."

It will be seen that, while the author denies the right of a second locator to enter upon the ground segregated by the first location, he recognizes the fact that overlapping locations are frequent, and declares the invalidity of the second location so far as it affects the rights vested in the prior locator, and in that he follows the cases from which we have quoted.

The practice of the land department has been in harmony with this view. The patents which were issued in this case for the Last Chance and New York claims give the entire boundaries of the original locations, and except from the grant those portions included within prior valid locations. So that on the face of each patent appears the original survey with the parallel end lines, the territory granted, and the territory excluded. The instructions from the land department to the surveyors general have been generally in harmony with this thought. Thus, in a letter from the commissioner of the land office to the surveyor-general of Colorado of date November 5, 1874, reported in 1 Copp's Landowner, page 133, are these instructions:

"In this connection I would state that the surveyor-general has no jurisdiction in the matter of deciding the respective rights of parties in cases of conflicting claims.

"Each applicant for a survey under the mining act is en-

titled to a survey of the entire mining claim as *located*, if held by him in accordance with the local laws and congressional enactments.

"If, in running the exterior boundaries of a claim, it is found that two surveys conflict, the plat and field notes should show the extent of the conflict, giving the area which is embraced in both surveys, and also the distances from the established corners at which the exterior boundaries of the respective surveys intersect each other."

Again, in a general circular issued by the land department on November 16, 1882, found in 9 Copp's Landowner, page 162, it is said:

"The regulations of this office require that the plats and field notes of surveys of mining claims shall disclose all conflicts between such surveys and prior surveys, giving the areas of conflicts.

"The rule has not been properly observed in all cases. Your attention is invited to the following particulars, which should be observed in the survey of every mining claim:

"(1) The exterior boundaries of the claim should be represented on the plat of survey and in the field notes.

"(2) The intersections of the lines of the survey, with the lines of conflicting prior surveys, should be noted in the field notes and represented upon the plat.

"(3) Conflicts with unsurveyed claims, where the applicant for survey does not claim the area in conflict, should be shown by actual survey.

"(4) The total area of the claim embraced by the exterior boundaries should be stated, and also the area in conflict with each intersecting survey, substantially as follows:"

Again, on August 2, 1883, in a letter from the acting commissioner to the surveyor-general of Arizona, reported in 10 Copp's Landowner, p. 240, it is said:

"You state, and it is shown to be so by said diagram, that the said Grand Dipper lode, so located, is a four-sided figure

with parallel end lines, the provisions of section 2320, Revised Statutes, being fully complied with.

"The survey of the claim made by the deputy surveyor cuts off a portion of the right end, shown to be in conflict with the Emerald lode, the easterly end line of the Emerald claim thus becoming one of the boundary lines of the said 'Grand Dipper,' and not parallel to the easterly end line of the Grand Dipper survey.

"I cannot see how you can give your approval to such survey. No reason exists why the survey lines should not conform directly to the lines of the location, they being properly run in the first instance."

It is true that on December 4, 1884, a circular letter was issued by the land department which slightly qualifies the general instructions previously issued. So that it may, perhaps, be truthfully said that the practice of the land department has not been absolutely uniform; and yet the descriptions which are found in the patents before us show that, notwithstanding the circular of 1884, the former practice still obtains.

It may be said that the statute gives to the first locator the right of exclusive possession; that an entry upon that territory with a view of making a subsequent location and marking on the ground its end and side lines is a trespass; and that to justify such an entry is to sanction a forcible trespass, and thus precipitate a breach of the peace. But no such conclusion necessarily follows. The case of *Atherton* v. *Fowler,* 96 U. S. 513, illustrates this. It appeared that one Page was in lawful possession of certain premises claimed under a Mexican grant, though his title had not been confirmed by any act of Congress; that while so in possession a party of persons, who had no interest or claim to any part of the land, invaded it by force, tore down the fences, dispossessed those who occupied and built on and cultivated parts of it under pretense of establishing a right of pre-emption to the several parts which

they had so seized. It was held that such forcible seizure of the premises gave no rights under the pre-emption law, and it was said (page 516):

"It is not to be presumed that Congress intended, in the remote regions where these settlements are made, to invite forcible invasion of the premises of another, in order to confer the gratuitous right of preference of purchase on the invaders. In parts of the country where these pre-emptions are usually made, the protection of the law to rights of person and property is generally but imperfect under the best of circumstances. It cannot, therefore, be believed, without the strongest evidence, that Congress has extended a standing invitation to the strong, the daring, and the unscrupulous to dispossess by force the weak and the timid from actual improvements on the public lands, in order that the intentional trespasser may secure by these means the preferred right to buy the land of the government when it comes into market."

But, while thus declaring that it cannot be presumed that Congress countenanced any such forcible seizure of premises, the court also observed (page 516):

"Undoubtedly, there have been cases, and may be cases again, where two persons making settlement on different parts of the same quarter section of land may present conflicting claims to the right of pre-emption of the whole quarter section, and neither of them be a trespasser upon the possession of the other, for the reason that the quarter section is open, uninclosed, and neither party interferes with the actual possession of the other. In such case, the settlement of the latter of the two may be *bona fide* for many reasons. The first party may not have the qualifications necessary to a pre-emptor, or he may have pre-empted other land, or he may have permitted the time for filing his declaration to elapse, in which case the statute expressly declares that another per-

son may become pre-emptor, or it may not be known that the settlements are on the same quarter."

The distinction thus suggested is pertinent here. A party who is in actual possession of a valid location may maintain that possession, and exclude every one from trespassing thereon, and no one is at liberty to forcibly disturb his possession or enter upon the premises. At the same time the fact is also to be recognized that these locations are generally made upon lands open, uninclosed, and not subject to any full actual occupation, where the limits of possessory rights are vague and uncertain, and where the validity of apparent locations is unsettled and doubtful. Under those circumstances it is not strange—on the contrary, it is something to be expected and, as we have seen, is a common experience—that conflicting locations are made, one overlapping another, and sometimes the overlap repeated by many different locations. And while, in the adjustment of those conflicts, the rights of the first locator to the surface within his location, as well as to veins beneath his surface, must be secured and confirmed, why should a subsequent location be held absolutely void for all purposes, and wholly ignored? Recognizing it so far as it establishes the fact that the second locator has made a claim, and in making that claim has located parallel end lines, deprives the first locator of nothing. Certainly, if the rights of the prior locator are not infringed upon, who is prejudiced by awarding to the second locator all the benefits which the statute gives to the making of a claim? To say that the subsequent locator must—when it appears that his lines are to any extent upon territory covered by a prior valid location—go through the form of making a relocation, simply works delay, and may prevent him, as we have seen, from obtaining an amount of surface to which he is entitled, unless he abandons the underground and extralateral rights which are secured only by parallel end lines.

In this connection it may be properly inquired, what is the significance of parallel end lines? Is it to secure to the locator in all cases a tract in the shape of a parallelogram? Is it that the surveys of mineral land shall be like the ordinary public surveys in rectangular form, capable of easy adjustment, and showing upon a plat that even measurement which is so marked a feature of the range, township, and section system? Clearly not. While the contemplation of Congress may have been that every location should be in the form of a parallelogram, not exceeding 1,500 by 600 feet in size, yet the purpose also was to permit the location in such a way as to secure not exceeding 1,500 feet of the length of a discovered vein, and it was expected that the locator would so place it as, in his judgment, would make the location lengthwise cover the course of the vein. There is no command that the side lines shall be parallel, and the requisition that the end lines shall be parallel was for the purpose of bounding the underground extralateral rights which the owner of the location may exercise. He may pursue the vein downward outside the side lines of his location, but the limits of his right are not to extend on the course of the vein beyond the end lines projected downward through the earth. His rights on the surface are bounded by the several lines of his location, and the end lines must be parallel, in order that going downwards he shall acquire no further length of the vein than the planes of those lines extended downward inclose. If the end lines are not parallel, then, following their planes downward, his rights will be either converging and diminishing or diverging and increasing the farther he descends into the earth. In view of this purpose and effect of the parallel end lines, it matters not to the prior locator where the end lines of the junior location are laid. No matter where they may be, they do not disturb in the slightest his surface or underground rights.

For these reasons, therefore, we are of opinion that the first question must be answered in the affirmative.

It may be observed in passing that the answer to this question does not involve a decision as to the full extent of the rights beneath the surface which the junior locator acquires. In other words, referring to the first diagram, the inquiry is not whether the owners of the Last Chance have a right to pursue the vein as it descends into the ground south of the dotted line *r, s,* even though they should reach a point in the descent in which the rights of the owners of the New York, the prior location, have ceased. It is obvious that the line *e, h,* the end line of the New York claim, extended downward into the earth will, at a certain distance, pass to the south of the line *r, s,* and a triangle of the vein will be formed between the two lines, which does not pass to the owners of the New York. The question is not distinctly presented whether that triangular portion of the vein up to the limits of the south end line of the Last Chance, *b, c,* extended vertically into the earth, belongs to the owners of the Last Chance or not, and therefore we do not pass upon it. Perhaps the rights of the junior locator below the surface are limited to the length of the vein within the surface of the territory patented to him, but it is unnecessary now to consider that matter. All that comes fairly within the scope of the question before us is the right of the owners of the Last Chance to pursue the vein as it dips into the earth westwardly between the line *a, d, t,* and the line *r, s,* and to appropriate so much of it as is not held by the prior location of the New York, and to that extent only is the question answered. The junior locator is entitled to have the benefit of making a location with parallel end lines. The extent of that benefit is for further consideration.

The second question needs no other answer than that which is contained in the discussion we have given to the first question, and we therefore pass it.

The third question is also practically answered by the same considerations, and, in the view we have taken of the statutes, the easterly side of the New York lode mining claim is not the end line of the Last Chance lode mining claim.

The fourth question presents a matter of importance, particularly in view of the inferences which have been drawn by some trial courts, state and national, from the decisions of this court. That question is:

"If the apex of a vein crosses one end line and one side line of a lode mining claim, as located thereon, can the locator of such vein follow it upon its dip beyond the vertical side line of his location?"

The decisions to which we refer are *Mining Co.* v. *Tarbet*, 98 U. S. 463; *Iron Silver M. Co.* v. *Elgin M. & S. Co.*, 118 U. S. 196, 6 Sup. Ct. 1177; *Argentine M. Co.* v. *Terrible M. Co.*, 122 U. S. 478, 7 Sup. Ct. 1356; *King* v. *Mining Co.*, 152 U. S. 222, 14 Sup. Ct. 510.

Two of these cases have been already noticed in this opinion. In *Mining Co.* v. *Tarbet* a surface location 2,600 feet long and 100 feet wide had been made. This location was so made on the supposition that it followed lengthwise the course of the vein, and the claim was of the ownership of 2,600 feet in length of such vein. Subsequent explorations developed that the course of the vein was at right angles to that which had been supposed, and that it crossed the side lines, so that there was really but 100 feet of the length of the vein within the surface area. It was held that the side lines were to be regarded as the end lines. In *Iron Silver M. Co.* v. *Elgin M. Co.* the location was in the form of a horseshoe. The end lines were not parallel. The location was quite irregular in form, and, inasmuch as one of the side lines was substantially parallel with one of the end lines, it was contended that this side line should be considered an end line, and this although the vein did not pass through such side line. But the court refused to recognize any such contention, and held that the

end lines were those which were in fact end lines of the claim as located, and that, as they were not parallel, there was no right to follow the vein on its dip beyond the side lines. In *Argentine M. Co.* v. *Terrible M. Co.* the claims of the plaintiff and defendant crossed each other, and in its decision the court affirmed the ruling in *Mining Co.* v. *Tarbet,* saying (page 485, 98 U. S.):

"When, therefore, a mining claim crosses the course of the lode or vein instead of being 'along the vein or lode,' the end lines are those which measure the width of the claim as it crosses the lode. Such is evidently the meaning of the statute. The side lines are those which measure the extent of the claim on each side of the middle of the vein at the surface."

In *King* v. *Amy Mining Co.* the prior cases were reaffirmed, and those lines which, on the face of the location were apparently side lines, were adjudged end lines, because the vein on its course passed through them, the location being not along the course of the vein but across it. But in neither of these cases was the question now before us presented or determined. All that can be said to have been settled by them is: First, that the lines of the location as made by the locator are the only lines that will be recognized; that the courts have no power to establish new lines or make a new location; second, that the contemplation of the statute is that the location shall be along the course of the vein, reading, as it does, that a mining claim "may equal, but shall not exceed, 1,500 feet in length along the vein or lode"; and, third, that when subsequent explorations disclose that the location has been made not along the course of the vein, but across it, the side lines of the location become in law the end lines. Nothing was said in either of these cases as to how much of the apex of the vein must be found within the surface, or what rule obtains in case the vein crosses only one end line. So, when *Last Chance M. Co.* v. *Tyler M. Co.,* 157 U. S. 683, 696, 15 Sup. Ct. 733, was before us (in which the question here

stated was presented, but not decided, the case being disposed of on another ground), we said, after referring to the prior cases, "But there has been no decision as to what extraterritorial rights exist if a vein enters at an end and passes out at a side line."

We pass, therefore, to an examination of the provisions of the statute. Premising that the discoverer of a vein makes the location; that he is entitled to make a location not exceeding 1,500 feet in length along the course of such vein, and not exceeding "three hundred feet on each side of the middle of the vein at the surface"; that a location thus made discloses end and side lines; that he is required to make the end lines parallel; that by such parallel end lines he places limits not merely to the surface area, but limits beyond which below the surface he cannot go on the course of the vein; that it must be assumed that he will take all of the length of the vein that he can,—we find from section 2322 that he is entitled to "all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically." Every vein whose apex is within the vertical limits of his surface lines passes to him by virtue of his location. He is not limited to only those veins which extend from one end line to another, or from one side line to another, or from one line of any kind to another, but he is entitled to every vein whose top or apex lies within his surface lines. Not only is he entitled to all veins whose apexes are within such limits, but he is entitled to them throughout their entire depth, "although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations." In other words, given a vein whose apex is within his surface limits he can pursue that vein as far as he pleases in its downward course outside the vertical side lines. But he can pursue the vein in its depth only outside the vertical side lines of his loca-

tion, for the statute provides that the "right of possession to such outside parts of such veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward as above described, through the end lines of their locations, so continued in their own direction that such planes will intersect such exterior parts of such veins or ledges."

This places a limit on the length of the vein beyond which he may not go, but it does not say that he shall not go outside the vertical side lines unless the vein in its course reaches the vertical planes of the end lines. Nowhere is it said that he must have a vein which either on or below the surface extends from end line to end line in order to pursue that vein in its dip outside the vertical side lines. Naming limits beyond which a grant does not go is not equivalent to saying that nothing is granted which does not extend to those limits. The locator is given a right to pursue any vein whose apex is within his surface limits, on its dip outside the vertical side lines, but may not in such pursuit go beyond the vertical end lines. And this is all that the statute provides. Suppose a vein enters at an end line, but terminates half way across the length of the location, his right to follow that vein on its dip beyond the vertical side lines is as plainly given by the statute as though in its course it had extended to the farther end line. It is a vein, "the top or apex of which lies inside of such surface lines extended downward vertically." And the same is true if it enters at an end and passes out at a side line.

Our conclusions may be summed up in these propositions: First, the location as made on the surface by the locator determines the extent of rights below the surface; second, the end lines, as he marks them on the surface, with the single exception hereinafter noticed, place the limits beyond which he may not go in the appropriation of any vein or veins along their course or strike; third, every vein "the top or apex of which lies inside of such surface lines extended downward

vertically" becomes his by virtue of his location, and he may pursue it to any depth beyond his vertical side lines, although in so doing he enters beneath the surface of some other proprietor; fourth, the only exception to the rule that the end lines of the location as the locator places them establish the limits beyond which he may not go in the appropriation of a vein on its course or strike is where it is developed that in fact the location has been placed, not along, but across, the course of the vein. In such case the law declares that those which the locator called his side lines are his end lines, and those which he called end lines are in fact side lines; and this upon the proposition that it was the intent of congress to give to the locator only so many feet of the length of the vein, that length to be bounded by the lines which the locator has established of his location. "Our laws have attempted to establish a rule by which each claim shall be so many feet of the vein, lengthwise of its course, to any depth below the surface, although laterally its inclination shall carry it ever so far from a perpendicular." *Mining Co.* v. *Tarbet,* 98 U. S. 463, 468.

These conclusions find support in the following decisions: *Stevens* v. *Williams,* 1 McCrary, 480, 490, Fed. Cas. No. 13, 413, in which is given the charge of Mr. Justice Miller to a jury, in the course of which he says: "You must take all the evidence together; you must take the point where it ends on the south, where it ends on the north, where it begins on the west and is lost on the east, and the course it takes; and from all that you are to say what is its general course. The plaintiff is not bound to lay his side lines perfectly parallel with the course or strike of the lode, so as to cover it exactly. His location may be made one way or the other, and it may so run that he crosses it the other way. In such event his end lines become his side lines, and he can only pursue it to his side lines, vertically extended, as though they were his end lines; but, if he happens to strike out diagonally, as far as

his side lines include the apex, so far he can pursue it laterally." *Wakeman* v. *Norton* (decided by the supreme court of Colorado, June 1, 1897), 49 Pac. 283, in which Mr. Justice Goddard, whose opinions, by virtue of his long experience as a trial judge in the mining districts of Leadville and Aspen as well as on the supreme bench of the state, are entitled to great consideration, said (page 286): "In instructing the jury that in order to give any extralateral rights, it was essential that the apex or top of a vein should, on its course, pass through both end lines of a claim, the court imposed a condition that has not heretofore been announced as an essential to the exercise of such right in any of the adjudicated cases." *Fitzgerald* v. *Clark,* 17 Mont. 100, 42 Pac. 273,— a case now pending in this court on writ of error. *Tyler Co.* v. *Last Chance Co.,* court of appeals, ninth circuit, decided by Circuit Judge McKenna, now a justice of this court, Circuit Judge Gilbert and District Judge Hawley, 7 U. S. App. 463, 4 C. C. A. 329, and 54 Fed. 284. *Cons. Wyoming Co.* v. *Champion Co.,* circuit court, northern district, California, decided by Hawley, District Judge, 63 Fed. 540. *Tyler Co.* v. *Last Chance Co.,* circuit court, district of Idaho, decided by Beatty, District Judge, who, in the course of his opinion, pertinently observed: "What reason, under the law, can be assigned why these rights shall not apply when his location is such that his ledge passes through it in some other way than from end to end? The law does not say that his ledge must run from end to end, but he is granted this right of following 'all veins, lodes and ledges throughout their entire depth, the top or apex of which lies inside of his surface lines.' Upon the fact that an apex is within his surface lines, all his underground rights are based. When, then, he owns an apex, whether it extends through the entire or through but a part of its location, it should follow that he owns an equal length of the ledge to its utmost depth. These are the important rights granted by the law. Take them away, and we take

all from the law that is of value to the miner." 71 Fed. 848, 851. *Carson City Co.* v. *North Star Co.*, circuit court, northern district of California, decided by Beatty, District Judge, 73 Fed. 597. *Republican Co.* v. *Tyler Co.*, circuit court of appeals, ninth circuit, decided by Circuit Judges Gilbert and Ross, and District Judge Hawley, 48 U. S. App. 213, 25 C. C. A. 178, and 79 Fed. 733. See, also, 2 Lindl. Mines, Sec. 591.

The fourth question, therefore, is answered in the affirmative.

The fifth question, in effect, seeks from this court a decision of the whole case, and, therefore, is not one which this court is called upon to answer. *Cross* v. *Evans*, 167 U. S. 60, 17 Sup. Ct. 733; *Warner* v. *New Orleans*, 167 U. S. 467, 17 Sup. Ct. 892.

It will therefore be certified to the court of appeals that the first question is answered in the affirmative, the third in the negative, the fourth in the affirmative. The second and fifth are not answered.

WALRATH v. CHAMPION MINING CO.

(171 U. S. 293; 18 Sup. Ct. 909. Supreme Court. May 31, 1898.)

[1]**Patent under act of 1866.** A patent issued under the act of July 26, 1866, though expressed as conveying a specified length of a vein, carries only so much thereof as has its apex within the boundaries of the actual location, though this includes less than the length mentioned in the patent.

[2]**Strike of discovery vein controls.** Under the provision in the act of 1872 (Rev. St. § 2322) giving to the locators of claims theretofore located any additional veins, lodes, or ledges existing therein, the end lines of the claim, for the purpose of determining extralateral rights in such additional veins, were the end lines of the original location and lode, and were not to be determined, irrespective thereof, by the direction of the newly-discovered lodes.

Coincidence of lines. A relocation of a claim which conflicts with another claim, so as to exclude the part in conflict, though accompanied by an express statement that the line of the other claim becomes an end line of the new location, is not a concession or agreement that such line is an end line of the other claim. Coincidence of lines between claims does not make them either side lines or end lines.

Admissions by superintendent. A statement by the superintendent of a mine owned by a corporation, made to the owner of an adjoining claim, that the lines of the latter would be respected as long as he was superintendent, does not bind the corporation, not being within the scope of his agency or authority.

End lines must be straight. It is the end lines alone, which define the extralateral rights, and they must be straight lines, not broken or curved lines, and to such the right on the vein below is strictly confined.

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[1]*Larned* v. *Jenkins*, 113 Fed. 634; 22 M. R. —. *Wolfley* v. *Lebanon Co.* 13 M. R. 282.

[2]*Cosmopolitan Co.* v. *Foote*, 101 Fed. 518; 20 M. R. —. *St. Louis Co.* v. *Montana Co.* 104 Fed. 664; 21 M. R. —.

A patent under the act of 1866 with diverging end lines may discard its end lines and claim so many feet at right angles to the strike of the lode. *Argonaut Co.* v. *Kennedy Co.* 131 Cal. 15; 21 M. R. —.

If it crosses one end and one side line a new plane is drawn; if it crosses both side lines, the lode has no extralateral rights. In such case the adjoining surface claim owns the lower portion of the vein. *Parrot Co.* v. *Heinze*, 25 Mont. 139; 21 M. R. —.

Appeal from the Circuit Court of Appeals of the Ninth Circuit.

This action, brought in the superior court of Nevada county, Cal., involves title to a triangular shaped section of what is known as the "Contact," "Ural," or "Back" ledge of gold-bearing ore, situated in the same county, claimed by appellant to be a portion of the Providence mine, to which complainant has title through a patent from the United States; and by appellee, a corporation, to be a part of the New Years Extension mine, owned by it.

The relative situation of the two properties, and the portion of the ledge in controversy, is shown by Fig. No. 1, on page 412, the disputed section being contained between the lines thereon marked "Line claimed by Providence," and "Line claimed by Champion."

The figures marked "New Years" and "New Years Extension" represent the surface of the mining properties owned by defendant, while that marked "Providence Mine" represents the surface of the patented ground of the plaintiff.

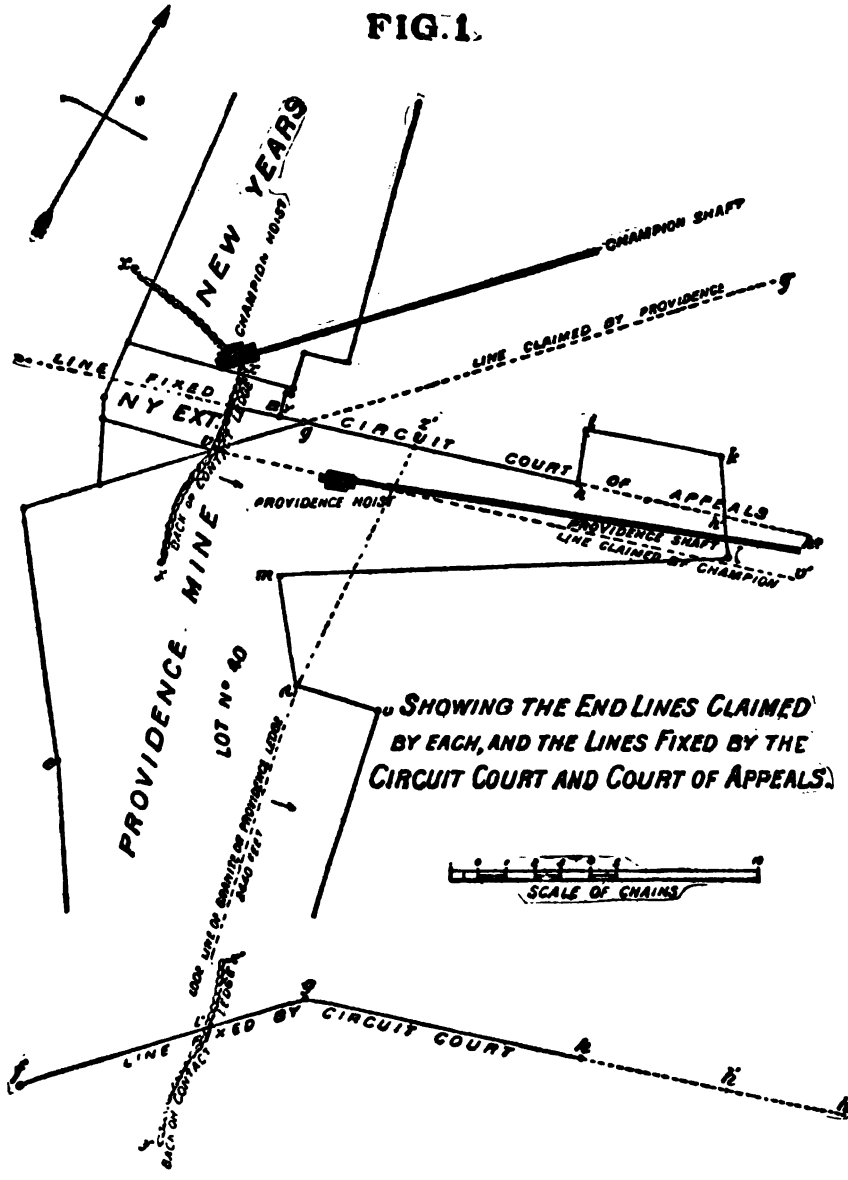
The action was brought May 24, 1892, to recover $300,000 damages for ore extracted from the ledge and carried away by the defendant, and for an injunction against further trespasses thereon.

Upon motion of appellee, the action was removed to the United States circuit court, as involving a federal question, where the complainant recast his pleadings so as to separate the action into a bill in equity, upon which the action is now proceeding, and an action at law for the damages alleged.

The suit in equity was tried in the circuit court, and decided mainly in favor of the appellee. 63 Fed. 552.

From this decree the appellant appealed to the court of appeals for the Ninth circuit, where it was modified, and as modified, affirmed. 19 C. C. A. 323, 72 Fed. 978.

FIG. 1.


NEW YEARS
CHAMPION HOIST
CHAMPION SHAFT
LINE CLAIMED BY PROVIDENCE
LINE FIXED BY
NY EXT
CIRCUIT COURT OF APPEALS
PROVIDENCE HOIST
PROVIDENCE SHAFT
LINE CLAIMED BY CHAMPION
PROVIDENCE MINE
LOT N° 40
SHOWING THE END LINES CLAIMED BY EACH, AND THE LINES FIXED BY THE CIRCUIT COURT AND COURT OF APPEALS.
SCALE OF CHAINS
LINE FIXED BY CIRCUIT COURT

The appellant now brings the case to this court upon writ of error from the court of appeals.

The appellant's title is deraigned as follows: In 1857, under the miners' rules and customs then in force, 31 locators located 3,100 feet of the Providence or Granite lode. By mesne conveyances the title to this location became vested in the Providence Gold & Silver Mining Company; and on April 28, 1871, that company obtained a patent to 3,100 feet of the lode, and for surface ground as described in the patent.

The title thus granted to the Providence Gold & Silver Mining Company was, before the commencement of this suit, vested in the appellant.

The ledge, as granted by the patent, extends 30 feet north of the north surface line of the location, and some 680 feet south of the south surface line.

The patent conveyed only the Providence ledge and the surface ground. All other ledges contained within the surface lines were expressly reserved.

It is also contended by appellant that by the act of congress of May 10, 1872, exclusive possession of all the surface included within the lines of the location was granted to the owners of the Providence, together with all other lodes or ledges having their tops or apexes within such surface lines. This grant, of course, included the Contact vein, subsequently discovered within said boundaries, and now constituting the bone of contention in this action.

The Contact vein is shown in the figure, and crosses the surface line *f-g* of the Providence location.

On September 29, 1877, the appellee and defendant, the Champion Mining Company, made a location upon the Contact vein, called the New Years Extension Mine. This location overlapped, both as to surface ground and lode, upon the Providence location; that is, the lode line and surface lines of the said New Years Extension extended to the south of the boundary line, *f-g*, of the Providence location.

The New Years Extension mine is shown in Fig. No. 2, on page 415, together with the conflict caused by the overlap, the conflicting surface portion being shaded, and showing the Contact vein passing through it.

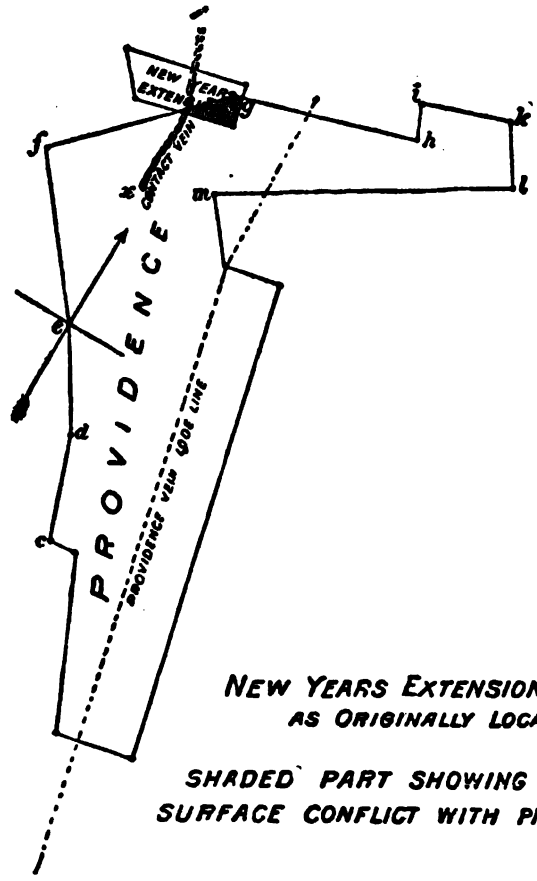
In the year 1884 the complainant and his co-owners objected to the overlap, and demanded of the Champion Mining Company that it abandon all claims to the surface and lode to the south of the Providence boundary line, above described. Thereupon, in the month of November, 1884, John Vincent, the superintendent of the defendant, the Champion Mining Company, under the authority and by the direction of the said company, relocated the New Years Extension mine by a notice of relocation, in which the fact of the overlap under the original location was particularly recited; and the lines were readjusted so as to avoid the overlap, and to conform to said line *f-g* of the Providence mine, as shown on Fig. 1.

In the notice of relocation the lode line was particularly described as follows: "The lode line of this claim, as originally located, and which I hereby relocate, is described as follows: Commencing at a point on the northerly bank of Deer creek, which point is 60 feet S., 11 degrees 45 minutes east, of the mouth of the New Years tunnel, and running thence along the line of the lode towards the N. E. corner of the Providence mill, about S., 46 degrees 15 minutes east, 200 feet, more or less, to a point and stake on the northerly line of the Providence mine, patented, designated as Mineral Lot No. 40, for the south end of said lode line."

It also contained the following statement:

"And whereas, part of this claim, as originally described, and as hereby relocated, conflicts with the rights granted by letters patent of said Providence mine, said lot No. 40: Now, therefore, so much of this claim, both for lode and surface ground, as originally conflicted or now conflicts with any portion of the surface or lode claims or rights granted by said

FIG. 2.



patent, is and are hereby abandoned, which portion of this claim so abandoned is described as follows: All that portion of the above-described New Years Extension claim for surface and lode which lies south of the northern boundary line of said Providence mine, which runs north, 43 degrees 10 minutes east, across the southeastern corner of this claim."

The New Years Extension, as relocated, is coterminous with the Providence mine on the northerly boundary line, designated as the line *f-g,* running S., 43 deg. W. Fig. 1.

That line is the only boundary between the two properties, and the only boundary of the Providence location which is crossed by the Contact ledge.

The first workings of the appellee involved no conflict with appellant. The shaft ran parallel with the Providence line, and none of the levels crossed that line until about three months before this suit was begun, when the 1,000-foot level was driven across it into the ground in dispute. Subsequently the eighth and ninth levels were driven across.

The work done by the Providence was carried on through a shaft sunk on the Providence or Granite ledge, from which shaft a crosscut was run back to the Contact vein on the 600-foot level, and another on the 1,250-foot level; and much of the ground now in controversy was thereby prospected and opened up by complainant and his co-owners. See Fig. 1.

The claims of the respective parties will be readily understood by reference to Fig. 1, which shows the relative position of all the mining properties belonging to both, with the lines claimed by them.

The portion of the Contact vein in dispute is that upon the dip of the ledge lying between the line marked "Line claimed by Providence" and the line marked "Line claimed by Champion."

The apex of the Contact vein is represented by the dotted line x-x^1, and shows the vein as far as exposed in both the Champion and Providence ground. South of x, the course of the vein in the Providence ground is unknown.

The line *f-g* is the same line as that designated A-B by some of the witnesses.

Upon the trial the circuit court held that there could be but one end line for each end of the Providence location, and that the lines *g-h* and *a-p* constituted such end lines; that

such lines constituted the end lines of not only the originally discovered Providence lode, but also of every other vein that might be discovered within the surface lines of the location. But, notwithstanding this holding, in entering the decree the line *f-g* was also established as an end line of the Contact vein, but for its length only, and then that from "*g*" the line *g-h*, and that line extended indefinitely eastwardly, constituted another end line for the same end of the lode, and constituted the line through which the plane determinative of all extralateral rights in the vein must be drawn.

From this decree the appellant here was allowed an appeal to the circuit court of appeals.

The latter court established the line g-h-h^1 as the sole end line of the Contact vein, and reversed the decree of the circuit court in so far as it fixed the line *f-g* as an end line.

As a result of this decree the complainant was not only shut out of all extralateral rights in the Contact vein north of the line g-h-h^1, but also of that portion of the vein lying vertically beneath the surface lines of the Providence which extend north of that line, and which are marked upon the figures as constituting the parallelogram h-i-k-h^1, which was awarded to the Champion. (See Fig. 1, showing the end line fixed by the circuit court and that line as subsequently fixed by the court of appeals, with the latter line extended in its own direction both eastwardly and westerly.)

From the judgment of the circuit court of appeals the appellant has appealed to this court.

There are nine assignments of error. The first eight attack so much of the decree as establishes the line *g-h* as an end line, for the purpose of determining the extralateral right, or fails to establish the line *f-g*, and that line produced indefinitely in the direction of g^1, as such end line. The last two assail so much of the decree as awards to appellee the right to pursue the vein on its downward course underneath the parallelogram h-i-k-h^1.

R. R. BIGELOW, DANIEL TITUS and JAMES F. SMITH, for appellant.

CURTIS H. LINDLEY, for appellee.

Mr. Justice McKENNA, after making the above statement, delivered the opinion of the court.

There are two questions presented by the assignment of errors:

(1) What are the extralateral rights of the appellant on the Contact vein?

(2) Is appellant entitled to that portion of the Contact vein within the Providence boundaries which lies north of the north end line fixed by the court, and which is described upon Fig. 1 as the parallelogram bounded by the lines marked *h-i-k-h*?

1. The appellant contends that the patent of the Providence ledge was conclusive evidence of his title to 3,100 feet in length of that vein. If true, this carried the northern end of the ledge 30 feet beyond the line fixed by either the circuit court or the circuit court of appeals. It was truly said at bar: "If it is not the end line of the Providence location, then certainly there is no reason for holding it to be the end line of the Contact vein."

The language of the patent is: "It being the intent and meaning of these presents to convey unto the Providence Gold and Silver Mining Company, and to their successors and assigns, the said vein or lode in its entire width for the distance of thirty-one hundred (3,100) feet along the course thereof."

The patent was issued under the act of 1866, and it is necessary, therefore, to some extent, to consider that act. By it, the appellant urges, the principal thing patented was the lode, and that the northern limit of that, and hence of his rights on that, was 30 feet north of the line fixed by the circuit court of appeals; and hence it is further contended

that, as the northern and southern surface lines (*g-h* and *a-p*) did not determine or limit his right to the lode under the act of 1866,—in other words, did not become end lines—they do not become end lines upon the Contact ledge (*x'x''*) acquired under the act of 1872, but that the surface line which crosses the strike of that ledge must be held to be the end line, and the line which fixes the rights of the parties. This line is *f-g*, Fig. 1, and, if appellant is correct, determines the controversy in his favor.

The extent of the right passing under the act of 1866 has been decided by this court.

In *Mining Co.* v. *Tarbet*, 98 U. S. 463, known as the Flagstaff Case, the superficial area of the Flagstaff mine was 100 feet wide by 2,600 feet long. It lay across the lode, not with it; and the company contended, notwithstanding that, it had a right to the lode for the length of the location. In other words, the contention was that it was the lode which was granted, and that the surface ground was a mere incident for the convenient working of the lode. The contention was presented and denied by the instructions which were given and refused by the lower court. That court instructed the jury that if they found Tarbet "was in possession of the claim, describing it, holding the same in accordance with the mining laws and the customs of the miners of the mining district, and that the apex and course of the vein in dispute are within such surface, then, as against one subsequently entering, he is deemed to be possessed of the land within his boundaries to any depth, and also of the vein in the surface to any depth on its dip, though the vein in its dip downward passes the side line of the surface boundary, and extends beneath other and adjoining lands; and a trespass upon such part of the vein on its dip, though beyond the side surface line, is unlawful, to the same extent as a trespass on the vein inside of the surface boundary. This possession of the vein outside of the surface line, on its dip, is limited in two ways,

—by the length of the course of the vein within the surface, and by an extension of the end lines of the surface claim vertically, and in their own direction, so as to intersect the vein on its dip; and the right of a possessor to recover for trespass on the vein is subject to only these restrictions."

Again: "The defendant (plaintiff in error) has not shown any title or color of title to any part of the vein, except so much of its length on the course as lies within the Flagstaff surface, and the dip of the vein for that length; and it has shown no title or color of title to any of the surface of the South Star and Titus mining claim, except so much of No. 3 as lies within the patented surface of the Flagstaff mining claim."

And the following instructions propounded by the owner of the Flagstaff:

"By the act of Congress of July 26, 1866, under which all these locations are claimed to have been made, it was the vein or lode of mineral that was located and claimed. The lode was the principal thing, and the surface area was a mere incident for the convenient working of the lode. The patent granted the lode, as such, irrespective of the surface area, which an applicant was not bound to claim. It was his convenience for working the lode that controlled his location of his surface area; and the patentee, under that act, takes a fee-simple title to the lode, to the full extent located and claimed under said act."

Commenting on the instructions, Mr. Justice Bradley, speaking for the court, said:

"These instructions and refusals to instruct indicate the general position taken by the court below, namely, that a mining claim secures only so much of a lode or vein as it covers along the course of the apex of the vein on or near the surface, no matter how far the location may extend in another direction."

And after stating that the act of 1872 was more explicit

than that of 1866, but the intent of both undoubtedly the same, as it respects lines and side lines, and the right to follow the dip outside of the latter, he proceeded as follows:

"We think that the intent of both statutes is that mining locations on lodes or veins shall be made thereon lengthwise, in the general direction of such veins or lodes on the surface of the earth where they are discoverable, and that the end lines are to cross the lode, and extend perpendicularly downwards, and to be continued in their own direction either way horizontally, and that the right to follow the dip outside of the side lines is based on the hypothesis that the direction of these lines corresponds substantially with the course of the lode or vein at its apex on or near the surface. It was not the intent of the law to allow a person to make his location crosswise of a vein, so that the side lines shall cross it, and thereby give him the right to follow the strike of the vein outside of his said lines. That would subvert the whole system sought to be established by the law. If he does locate his claim in that way, his rights must be subordinated to the rights of those who have properly located on the lode. Their right to follow the dip outside of their side lines cannot be interfered with by him. His right to the lode only extends to so much of the lode as his claim covers. If he has located crosswise of the lode, and his claim is only one hundred feet wide, that one hundred feet is all he has a right to. This we consider to be the law as to locations on lodes or veins.

"The location of the plaintiff in error is thus laid across the Titus lode, that is to say, across the course of its apex at or near the surface; and the side lines of the locations are really the end lines of the claim, considering the direction or course of the lode at the surface.

"As the law stands, we think the right to follow the dip of the vein is bounded by the end lines of the claim, properly so called, which lines are those which are crosswise of the general course of the vein on the surface. The Spanish min-

—by the length of the course of the vein within the surface, and by an extension of the end lines of the surface claim vertically, and in their own direction, so as to intersect the vein on its dip; and the right of a possessor to recover for trespass on the vein is subject to only these restrictions."

Again: "The defendant (plaintiff in error) has not shown any title or color of title to any part of the vein, except so much of its length on the course as lies within the Flagstaff surface, and the dip of the vein for that length; and it has shown no title or color of title to any of the surface of the South Star and Titus mining claim, except so much of No. 3 as lies within the patented surface of the Flagstaff mining claim."

And the following instructions propounded by the owner of the Flagstaff:

"By the act of Congress of July 26, 1866, under which all these locations are claimed to have been made, it was the vein or lode of mineral that was located and claimed. The lode was the principal thing, and the surface area was a mere incident for the convenient working of the lode. The patent granted the lode, as such, irrespective of the surface area, which an applicant was not bound to claim. It was his convenience for working the lode that controlled his location of his surface area; and the patentee, under that act, takes a fee-simple title to the lode, to the full extent located and claimed under said act."

Commenting on the instructions, Mr. Justice Bradley, speaking for the court, said:

"These instructions and refusals to instruct indicate the general position taken by the court below, namely, that a mining claim secures only so much of a lode or vein as it covers along the course of the apex of the vein on or near the surface, no matter how far the location may extend in another direction."

And after stating that the act of 1872 was more explicit

than that of 1866, but the intent of both undoubtedly the same, as it respects lines and side lines, and the right to follow the dip outside of the latter, he proceeded as follows:

"We think that the intent of both statutes is that mining locations on lodes or veins shall be made thereon lengthwise, in the general direction of such veins or lodes on the surface of the earth where they are discoverable, and that the end lines are to cross the lode, and extend perpendicularly downwards, and to be continued in their own direction either way horizontally, and that the right to follow the dip outside of the side lines is based on the hypothesis that the direction of these lines corresponds substantially with the course of the lode or vein at its apex on or near the surface. It was not the intent of the law to allow a person to make his location crosswise of a vein, so that the side lines shall cross it, and thereby give him the right to follow the strike of the vein outside of his said lines. That would subvert the whole system sought to be established by the law. If he does locate his claim in that way, his rights must be subordinated to the rights of those who have properly located on the lode. Their right to follow the dip outside of their side lines cannot be interfered with by him. His right to the lode only extends to so much of the lode as his claim covers. If he has located crosswise of the lode, and his claim is only one hundred feet wide, that one hundred feet is all he has a right to. This we consider to be the law as to locations on lodes or veins.

"The location of the plaintiff in error is thus laid across the Titus lode, that is to say, across the course of its apex at or near the surface; and the side lines of the locations are really the end lines of the claim, considering the direction or course of the lode at the surface.

"As the law stands, we think the right to follow the dip of the vein is bounded by the end lines of the claim, properly so called, which lines are those which are crosswise of the general course of the vein on the surface. The Spanish min-

ing law confined the owner of a mine to perpendicular lines on every side, but gave him greater or less width according to the dip of the vein. See Rockwell, pp. 56-58, and pp. 274, 275. But our laws have attempted to establish a rule by which each claim shall be so many feet of the vein, lengthwise of its course, to any depth below the surface, although laterally its inclination shall carry it ever so far from a perpendicular. This rule the court below strove to carry out, and all its rulings seem to have been in accordance with it."

This law was followed and applied in *Argentine M. Co.* v. *Terrible M. Co.*, 122 U. S. 478, 7 Sup. Ct. 1356, and in *Iron-Silver M. Co.* v. *Elgin M. & S. Co.*, 118 U. S. 196, 6 Sup. Ct. 1177; *King* v. *Amy & Silversmith Min. Co.*, 152 U. S. 222, 14 Sup. Ct. 510. The locations passed upon in these cases were made under the act of 1872, but we have seen that the intent of that act and the act of 1866, "as it respects end lines and side lines," was the same.

But appellant urges that "those cases are not in point here." We think that they are. The patent in the Flagstaff Case appears to have been the same as here, and, besides, whatever the patent here, it must be confined to the rights given by the statute which authorized it.

In the Flagstaff Case the lode was claimed, and hence the right to follow it beyond the surface boundaries of the location was claimed. Here the lode is claimed, and the right to follow it outside of the surface boundaries; that is, beyond the line *f-g* to the point x^1. In that case the right contended for was denied on the principle applicable to end and side lines. In this case the right contended for must be denied by the application of the same principle.

But, appellant asks, admitting for the argument's sake that it (the line *g-h*) does constitute an end line of the location, within the meaning of the law of May 10, 1872, does it constitute the end line of the Contact vein? And in answering

the question, he says: "The end line of a lode is the boundary line which crosses it, regardless of whether it was originally intended as an end line or side line. Four times has this principle been sustained by this court." He then cites the cases we have cited, and claims that they "are, of course, conclusive of this controversy, if they are in point."

Under the law of July 26, 1866, c. 262, a patent could be issued for only one vein. 14 Stat. 251. The act of 1872 gave to all locations theretofore made, as well as to those thereafter made, all veins, lodes, and ledges, the top or apex of which lie inside of the surface lines. Section 3 of the act, which is also section 2322 of the Revised Statutes, is as follows:

"The locators of all mining locations heretofore made, or which shall hereafter be made, on any mineral vein, lode or ledge, situated on the public domain, their heirs and assigns, where no adverse claim exists on the tenth day of May, eighteen hundred and seventy-two, so long as they comply with the laws of the United States, and with state, territorial and local regulations not in conflict with the laws of the United States governing their possessory title, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations. But their right of possession to such outside parts of such veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward, as above described, through the end lines of their locations, so continued in their own direction that such planes will intersect such exterior parts of such veins or ledges. And nothing in this section shall authorize the locator or possessor of a vein or lode which extends in its

downward course beyond the vertical lines of his claim to enter upon the surface of a claim owned or possessed by another." Act May 10, 1872, c. 152, § 3; Sec. 2322, Rev. Stat.

Appellant's right upon the Contact vein is given by this statute. What limits this right extralaterally? The statute says, vertical planes drawn downward through the end lines of the location. What end lines? Those of, and as determined by, the original location and lode, the circuit court of appeals decided. Those determined by the direction of the newly-discovered lodes regardless whether they were originally intended as end lines or side lines, the appellant, as we have seen, contends. The court of appeals was right. Against the contention of appellant the letter and spirit of the statute oppose, and against it the decisions of this court also oppose.

The language of the statute is that the "outside parts" of the veins or ledges "shall be confined to such portions thereof as lie between vertical planes drawn downwards * * * through the end lines of their locations. * * *" And Mr. Justice Field, speaking for the court, said in *Iron-Silver M. Co.* v. *Elgin M. & S. Co.*, 118 U. S. 196-198, 6 Sup. Ct. 1183:

"The provision of the statute that the locator is entitled, throughout their entire depth, to all the veins, lodes, or ledges, the top or apex of which lies inside of the surface lines of his location, tends strongly to show that the end lines marked on the ground must control. It often happens that the top or apex of more than one vein lies within such surface lines, and the veins may have different courses and dips; yet his right to follow them outside of the side lines of the location must be bounded by planes drawn vertically through the same end lines. The planes of the end lines cannot be drawn at a right angle to the courses of all the veins, if they are not identical."

The court, however, did not mean that the end lines, called

such by the locator, were the true end lines, but those which "are crosswise of the general course of the vein *on the surface.*"

This court, in *Del Monte M. & M. Co.* v. *Last Chance M. & M. Co.* (decided at the present term *Ante,* 55, 19 M. R. 370,) reviewed the cases we have cited; and, speaking for the court, Mr. Justice Brewer said:

"Our conclusion may be summed up in these propositions: First, the location as made on the surface by the locator determines the extent of rights below the surface; second, the end lines, as he marks them on the surface, with the single exception hereinafter noticed, place the limits beyond which he may not go in the appropriation of any vein or veins along their course or strike; third, every vein, 'the top or apex of which lies inside of such surface lines extended downward vertically,' becomes his by virtue of his location, and he may pursue it to any depth beyond his vertical side lines, although in so doing he enters beneath the surface of some other proprietor; fourth, the only exception to the rule that the end lines of the location, as the locator places them, establish the limits beyond which he may not go in the appropriation of a vein on its course or strike, is where it is developed that in fact the location has been placed, not along, but across, the course of the vein. In such case the law declares that those which the locator called his side lines are his end lines, and those which he called end lines are in fact side lines; and this, upon the proposition that it was the intent of Congress to give to the locator only so many feet of the length of the vein, that length to be bounded by the lines which the locator has established of his location. Our laws have attempted to establish a rule by which each claim shall be so many feet of the vein lengthwise of its course, to any depth below the surface, although laterally its inclination shall carry it ever so far from a perpendicular." *Mining Co.* v. *Tarbet,* 98 U. S. 463-468.

These propositions we affirm, with the addition that the end lines of the original veins shall be the end lines of all the veins found within the surface boundaries.

The appellant contends that by agreement, by acquiescence, and by estoppel, the line *f-g* has become the end line between the two claims.

This contention is attempted to be supported by (a) a relocation of the New Years Extension claim, by which, it is asserted, it recognized and designated the line *f-g* as the northerly end line of the Providence claim; (b) the testimony of the superintendent as to what took place betwen him and the directors before sinking the Champion shaft, and afterwards between him and a co-tenant of complainant (appellant).

(a) The relocation does not in terms recognize the line *f-g* as the northern end line of the Providence. Its recitals are:

"And whereas, part of this claim, as originally described, and as hereby relocated, conflicts with the rights granted by the letters patent of said Providence mine, said lot No. 40: Now, therefore, so much of this claim, both for lode and surface ground, as originally designated, conflicting, or now conflicts, with any portion of the surface or lode, claims or rights, granted by said patent, is and are hereby abandoned."

"Which portion of this claim so abandoned is described as follows: All that portion of the above-described New Years Extension claim for surface and lode which lies south of the northern boundary line of said Providence mine, which runs north, 43 degrees 10 minutes east, across the southeastern corner of this claim."

It will be observed, by reference to Fig. 1, that the northern boundary of the Providence is not one line, but two lines, and it is the one which runs north, 43° 10′ east, across the southern corner, which is designated in the relocation of the New Years claim.

In the notice of relocation, however, the northerly line of

the Providence is called the south end line of the relocated ground. The description is as follows:

"The lode line of this claim, as originally located, and which I hereby relocate, is described as follows: Commencing at a point on the northerly bank of Deer creek, which point is 80 feet S., 11 deg. 45 minutes east, of the mouth of the New Years tunnel, and running thence along the line of the lode towards the N. E. corner of the Providence mill about S., 46 deg. 15 minutes east, 200 feet, more or less, to a point and stake on the northerly line of the Providence mine, patented, designated as Mineral Lot No. 40, for the south end of said lode line, and that the Contact vein crosses in its onward course the southerly end line of said New Years Extension claim, and enters the lands and premises of plaintiff described in said bill of complaint."

It is hence contended that, if the line *f-g* is the southerly end line of the New Years Extension, it must necessarily be the northern end line of the Providence mine. This does not follow, nor is there any concession of it. Coincidence of lines between claims does not make them side lines or end lines. Whether they shall be so regarded depends upon the legal considerations, which we have already sufficiently entered into, and need not repeat. We do not say that there may not be an agreement settling end lines. One example of such an agreement was exhibited in *Richmond M. Co.* v. *Eureka M. Co.*, 103 U. S. 839.

(b) The testimony relied on was admitted against the objection of defendants (appellees). It was as follows:

"Q. Then you may go on, Mr. Vincent, and state how you started that work, and how you planned it, and what communications you had, if any, with the board of directors of the Champion Mining Company.

* * * * * * *

"A. Well, I was sent up by the board of directors to do whatever work I thought was for the best of the company.

I started that shaft down, and had it down about 40 feet; and I reported to the board of directors, in session, about what work I had done, and they calculated to go to work and put up hoisting works, and run that shaft down further.

"Q. What, if any, communication did you make, or was there any communication from the board to you concerning the direction of the shaft, and why any given direction was adopted for the shaft?

"A. There was none, but then I reported to the board that such was the case; that the shaft was laid out so it would never interfere with this line."

The witness further testified that he sank the shaft 540 feet, and was discharged on the 1st of August, 1889; and he was further questioned as follows:

"Q. State whether at the time you were sinking that shaft you were called upon by Mr. Walrath, the complainant in this action, or his brother, Mr. Richard Walrath, to make any inquiry of you concerning the construction of that shaft, and what the intention was,—whether to cross the Providence line or not, as marked on the map?

* * * * * * *

"A. Well, Mr. Walrath, he happened to come along; and he made a remark to me that he wished for us, of course, to keep his line, and not to cross it, as he didn't want any more trouble as he did have with some other mining properties adjoining; that he didn't want any more holes in his ground; and so I answered him that I would respect his line as long as I am here.

"The Court: That you would respect his line as long as you were there?

"A. As long as I was superintendent of the mine.

"Q. Where did this conversation take place?

"A. Right on the premises.

"Q. You were then acting as superintendent, were you?

"A. Yes, sir.

"Q. What line was referred to at that time as the Providence line? Can you point it out on the map?

"A. Yes, sir; it is the line marked 'A-B' on the map, Exhibit 4."

This testimony does not establish an equitable estoppel, nor is the corporation bound by the declarations of the superintendent. They were without the scope of his agency or authority.

2. The right of that portion of the Contact ledge within the boundaries of the parallelogram *h-i-k-h*[1] presents an interesting question. It does not appear to have been submitted to either of the lower courts, but the right by the decree of the circuit court is given to appellee, by adjudging to it that portion of the vein on its dip which lies northeasterly of the line *g-h* and its continuation.

The question is a new one in this court, but we think it is determined by the principles hereinbefore laid down. It may be true that under the act of 1866 the patenting of the Providence mine in its irregular shape was in all respects legal and proper, and that the act did not require the location to be made in the form of a parallelogram, or in any particular form, and that there was no requirement that the end lines should be parallel. It is also true that under that act only one vein could be included in a location, no matter how much surface ground was included in the patent, but that under the act of 1872 possession and enjoyment of all the surface included within the lines of their location, and of all veins, lodes, and ledges throughout the entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, were given.

But rights on the strike and on the dip of the original vein, and rights on the strike and on the dip of the other veins, we have decided, are determined by the end lines of the location. In other words, it is the end lines,

alone, not they and some other lines, which define the extralateral right; and they must be straight lines, not broken or curved ones. The appellant, under his contention, would get the right such lines would give him, and something more, besides, outside of them. To specialize, he would get all within a plane drawn through the line *g-h*, and all within the planes drawn through the sides of the parallelogram *h-i-k-h*[1], Fig. 1.

It may be that the end lines need not be parallel, under the act of 1866; may converge or diverge; and may even do so as to new veins, of which, however, we express no opinion, but they must be straight—no other define planes which can be continuous in their own direction, within the meaning of the statute. It may be that there was liberty of surface form under that act, but the law strictly confined the right on the vein below the surface. There is liberty of surface form under the act of 1872. It was exercised in *Iron-Silver M. Co.* v. *Elgin M. & S. Co., supra,* in the form of a horseshoe; in *Montana Co.* v. *Clark,* 42 Fed. 626, in the form of an isosceles triangle.

The decree is affirmed.

CHARLES KELLY v. JOS. K. CLARK ET AL.

(21 Montana 291; 53 Pac. 959. Supreme Court. July 5, 1898.)

A plaintiff may recover upon proof of constructive fraud without proving the actual fraud charged.

The statute prescribing no form of remedy, a party seeking to enforce the personal liability created by the statute after his execution against the corporation has been returned nulla bona, may bring his action in equity to obtain relief against the stockholders.

Value $125,000. Price $7,500,000. Under the constitutional provision and the statute providing for personal liability until the whole amount of stock subscribed for has been paid in and the statute allowing the issue of stock in payment for mines to the value thereof—the purchase of a mine which the stockholders knew was worth not over $125,000, and payment therefor in stock whose par value is $7,500,000, which is repurchased by the stockholders with full knowledge of the transaction at 2½ per cent. of its par value, is fraudulent as to a creditor, and the stock will be treated as unpaid to the extent of the difference between the actual value of the mine and the nominal value of the stock.

Knowledge of undervaluation. One accepting mining stock issued to him with knowledge that it represented a mine worth only about one and two-thirds per cent. of the total stock subscribed cannot escape liability to creditors for the unpaid balance on the ground that he did not sign the stock subscription list.

Liability for tort judgment. Under Comp. St. 1887, div. 5, c. 25, § 457, providing that stockholders shall be individually liable to the amount of their unpaid stock for all acts and contracts of the company until the whole amount of stock subscribed for shall have been paid in, a holder of such unpaid stock is liable for the torts of the corporation.

The statute of limitations does not begin to run against a stockholder of a corporation liable on unpaid stock for a tort of the corporation, until the creditor has liquidated his claim, or reduced it to judgment, and failed to make it against the corporation, unless it appears to be useless to proceed against the corporation.

The Amity Company was organized under a statute requiring its stock to be paid for and at once commenced doing business, though nothing whatever was paid on its stock: *Held*, that the stockholders both original and by purchase were liable as general partners. *Hill* v. *Stetler*, (Pa.), 13 Atl. 306.

Appeal from District Court, Lewis and Clarke County; Horace R. Buck, Judge.

Suit by Charles Kelly against the Fourth of July Mining Company, Joseph K. Clark and others. There was a judgment for plaintiff against Joseph K. Clark, and from the judgment and an order denying a new trial he appeals. Affirmed.

Statement of the facts by the Justice delivering the opinion.

The Fourth of July Mining Company, a mining corporation, was organized under the laws of Montana (chapter 25, div. 5, Genl. Laws, 1887) on December 19, 1889. Its capital stock named in the articles of incorporation was $7,500,000, consisting of 750,000 shares of $10 each. The articles of incorporation were signed by J. K. Pardee, S. T. Hauser, E. Zimmerman, W. F. Sanders, T. H. Kleinschmidt, J. K. Clark, and L. Teuscher. These same persons were named in the articles as trustees, and became the trustees of the corpora-

Where stock exchanged for mines is found by a jury not worth more than one-fifth of the value at which it was turned in, this, though presumptive evidence of fraud, does not charge the incorporators with legal fraud where they are shown to have made their valuation honestly. *Young* v. *Erie Iron Co.* 65 Mich. 111; 31 N. W. 814.

Purchasers in good faith of stock issued for land above its value are exempt from further assessments. *Id.*

The "orignial cost" of stock means its cost to the vendor. *Eagan* v. *Clasbey*, 5 Utah 154; 13 Pac. 430.

Recovery where directors appropriate the stock without consideration. *Brewster* v. *Hatch*, 122 N. Y. 349; 19 Am. St. R. 498.

One who deals with a corporation knowing its stock has not been fully paid in, has no right to insist on greater contribution. *First National Bank* v. *Gustin Co.* 42 Minn. 327; 18 Am. St. R. 510.

Certificate for stock not paid for is void. *Kellerman* v. *Maier*, 116 Cal. 416; 48 Pac. 377.

Bona fide stockholder treated same as note holder. *Rough* v. *Breitung*, 117 Mich. 48; 75 N. W. 147.

Over valuation of mines transferred for stock will not make hold-

tion, which was immediately perfected in its organization by the election of the defendant J. K. Clark as president, S. T. Hauser as vice president, T. H. Kleinschmidt as treasurer, C. B. Garrett as secretary, and J. K. Pardee as manager. The complaint of the plaintiff (respondent here), after averring the facts as hereinbefore set forth in relation to the incorporation and organization of the corporation, then alleges that the trustees of said company, for the purpose of fraudulently relieving all persons who had theretofore subscribed for stock, or who might thereafter subscribe for stock, or who might thereafter by any means become owners of stock in the said company, from any personal liability by reason of such subscription or ownership, did on December 19, 1889, cause to be spread upon the records of the meeting of the trustees a resolution to the effect that J. K. Pardee appeared before the meeting, and offered to convey a seven-eighths interest of the Fourth of July Mine to the corporation, in consideration of 750,000 shares of the stock of said corporation, and that the proposition was accepted. It is

ers liable as for unpaid subscription until the transaction has been first impeached for fraud on the corporation. *Mer. Bank* v. *Belington Co.* 51 W. Va. 60; 41 S. E. 390.

Published reports of market sales are not evidence of value. *Vogt* v. *Cope*, 66 Cal. 31; 4 Pac. 915.

Transfer of stock as gift to a company, held valid. *Wheeler* v. *Mineral Farm Co.* (Colo), 71 Pac. 1101.

Vendors of mines for stock are entitled to the same as soon as organization is complete. *Philes* v. *Hickies*, (Ariz.), 18 Pac. 595.

Statement that certain parties had subscribed for stock when in fact it had been given to them is a fraudulent misrepresentation. *Coles* v. *Kennedy*, 17 M. R. 357.

Treasury stock is "exhausted" when directors cannot sell it. *Gary* v. *York M. Co.* 9 Utah 464; 35 Pac. 494.

Right of president of company to agree to pay attorney in stock. *Merrill* v. *Consumers Co.* 114 N. Y. 216; 21 N. E. 155.

Subscribers are entitled to have a de jure corporation. Subscribers after organization are estopped to deny its legality. *Capps* v. *Hastings Co.* 40 Neb. 470; 58 N. W. 956.

A transfer of a few shares to enable the party to become a director

averred that, upon the acceptance of said proposition, the said Pardee transferred to the corporation a seven-eighths interest in said mine, and the trustees thereupon directed that the company deliver to T. H. Kleinschmidt, trustee for J. K. Pardee, by agreement with the said trustees, all of the capital stock of said company, to wit, 750,000 shares, to be by said Kleinschmidt distributed as the said Pardee should direct; that the seven-eighths interest in the mine conveyed by Pardee to the corporation was not of greater value than $75,000, and that each and all of the trustees knew at the time of the conveyance of the same that it was of no greater value than $75,000, but that, in violation of their duty, the trustees fraudulently, and with intent to relieve such persons as had subscribed for stock of said company, or who might thereafter subscribe, or who might become owners of stock, from any personal liability by reason of such subscription or ownership, accepted the conveyance from Pardee in full payment for 750,000 shares of stock issued as aforesaid; that the corporation was organized to purchase the said seven-

makes him a stockholder but where his actual liability amounts to only $1.40 the maxim *de minimis* applies. *Moore* v. *Boyd*, 74 Cal. 167; 15 Pac. 670.

A creditor need not allege his ignorance of the fact that less than par was paid by the defendant stockholders. *Gogebic Co.* v. *Iron Chief Co.* 78 Wis. 427; 47 N. W. 726.

Facts stated excusing apparent over-valuation of claims. The fact that the mine proves a failure is no evidence that it never had prospective value. *Richardson* v. *Treasure Hill Co.* 23 Utah 366; 65 Pac. 74.

Sale of mining claims on which no valid discoveries existed, in exchange for stock, treated as a deed without consideration and as no payment for the stock. *Buck* v. *Jones*, 17 Colo. App. —; 22 M. R. —.

Acts of husband as director no estoppel on the wife, as stockholder. *Booth* v. *Smith*, 117 Ill. 370; 7 N. E. 610. *Longdale Co.* v. *Pomeroy Co.* 34 Fed. 448.

The statute which the opinion in the text case construes was materially amended in 1895. See *Crowley* v. *Walton*, 23 R. I. 331; 21 M. R. —, where subscribers were held in action beyond the state.

eighths interest from Pardee, and that for such purpose the defendants Kleinschmidt, Seligman, Clark, Phelps, and the other parties named as trustees, together with others, associated themselves to organize the said mining company, and to acquire the said property under the mutual agreement that the corporation should be organized with a capital stock of $7,500,000 in shares of $10 each, and that all of the stock should be, as it afterwards was, transferred to said Pardee in exchange for the seven-eighths interest in the mine, each of the persons associating themselves agreeing to take from Pardee, after the stock should be issued to him, a certain number of shares of the stock at the rate of 25 cents per share; and that each and all of such persons, at the time they associated themselves together, well knew that the said seven-eighths interest in the said mine was not worth to exceed $75,000, and that $7,500,000 was a sum grossly and fraudulently in excess of the true value of the mine, and that the said agreement to so issue the stock to the said Pardee was entered into between the said persons so associating themselves with the fraudulent intent of relieving themselves from any personal liability by reason of their becoming the owners of any of said stock upon the pretense that the same had been fully paid for; that each of the defendants became the owner of certain shares of the capital stock of the company, defendant Clark being at the time of the commencement of this action the owner of 173,800 shares, and that each of the defendants acquired his stock with the full knowledge of the fact that the same had been originally issued to Pardee upon a gross and fraudulent overvaluation of the property transferred in exchange for the same, and that the said property so transferred was of a value not to exceed $75,000, by reason of which plaintiff averred that all of said stock so held by the defendants is unpaid stock, except in the proportion which $75,000 bears to $7,500,000.

"The plaintiff then avers that on June 28, 1894, he re-

covered a judgment against the Fourth of July Mining Company in the sum of $15,600 and costs, for damages on account of personal injuries plaintiff received while in the service of the defendant company and under contract with it; that execution was duly issued upon said judgment, but that the same was returned wholly unsatisfied; and that the Fourth of July Mining Company is wholly insolvent. The plaintiff demanded judgment that the amount due and unpaid upon the stock of said mining company held or owned by defendants may be determined by the court, and that they and each of them be adjudged to be indebted thereon to the said mining company upon each share of stock held or owned in the amount of the face value thereof, to wit, $10, less such proportion of the sum of $10 as $75,000 bears to $7,500,000; that they and each of them be required to pay into court such sums as may be so found due; and, that out of the sum so paid, plaintiff be paid the amount of his judgment against the corporation, with interest and costs.

The defendant Clark denied the allegations of the complaint in relation to the fraudulent intent and purposes alleged in plaintiff's complaint pertaining to the organization and purposes of the organization of the corporation, and set forth affirmatively "that at the first meeting of the board of directors of the company a proposition, similar to the one referred to in the complaint, was made to the directors; that said proposition was referred to a committee of three members of the said board of directors, to investigate said proposition and report thereon to said board of trustees; that the committee reported that the property offered for sale was worth the consideration asked therefor, and that it was for the best interest of said corporation to accept such proposition and purchase said property; and that thereafter defendant Clark, relying on the report of said committee, and in good faith believing the same, and with no intention at that time of buying any stock in said company, and without

having agreed to buy any thereof, voted to accept such proposition. Clark further states that he never bought or agreed to buy any stock in said corporation until long after the stock had been issued in payment of the same, and that he never did buy any stock except such as was purchased by him in open market, and that all such stock was on its face declared to be fully paid. Defendant's answer also sets forth the fact that on the 19th day of December, 1889, the Fourth of July property so bought by the company was of the reasonable value of $7,500,000." The defendant Clark, for a separate defense, also alleged that the injury which the plaintiff herein suffered, and for which he recovered the judgment mentioned in the complaint herein, was received by him more than three years before the commencement of this action, and that all the stock which he ever bought or owned in said defendant company was so bought more than four years prior to the commencement of this action.

The defendants Seligman and the Fourth of July Mining Company filed a separate answer, setting forth substantially what the answer of defendant Clark contained in relation to the denials of fraud alleged in plaintiff's complaint.

The plaintiff replied to defendant Clark's answer, denying Clark's belief in the report of the commitee in relation to the value of the mine, or that he acted thereon in good faith, denying that defendant Clark never agreed to buy stock in the corporation until long after the stock had been issued in payment for the mine, and denying that all or any of the rest of the stock ever bought or owned by defendant was bought by him from a prior purchaser, who had bought the same in open market. The replication to the other answer is substantially the same as the last.

The case was tried to a jury. Separate findings were returned. The court adopted all the findings of the jury except two. Conclusions of law were made by the court, rendering J. K. Clark liable for the claim of plaintiff. Judg-

ment was ordered accordingly in plaintiff's favor, against Clark, but in favor of defendants Kleinschmidt and Seligman. Defendant Clark moved for a new trial, which was denied. He appeals to this court from the judgment and the order denying his motion for a new trial.

CLAYBERG & CORBETT, JOHN B. WELCOME, WM. H. DE WITT and THOS. C. BACH, for appellant.

C. B. NOLAN and T. J. WALSH, for respondent.

HUNT, J. Appellant's counsel, in their opening brief, declare they find difficulty in telling whether the respondent's action was brought upon the theory that defendant was liable, as a subscriber of stock, for the difference between what he actually paid therefor and the par value thereof, or whether it is sought to charge appellant with fraud, as a director of the company. This difficulty arises, argue counsel, because it appears by the complaint that the theory of respondent is that the trustees fraudulently, and to relieve themselves of personal liability, caused all the capital stock to be issued to Pardee in payment of the property, which they claim was of the value of only $75,000. Counsel say: "Actual fraud" is charged, but, because it is not alleged or proved how Kelly was put in any different position by reason of the issuance of the stock in payment of the property in excess of its actual value than he otherwise would have been, they conclude no damage was proved to have come to him. Solution of this difficulty being of importance, an examination of the findings of the jury is appropriate in order to understand the exact facts to which must be applied the principles that should control.

Considerable testimony was heard bearing directly upon the issues submitted to the jury, and the following facts were found: (1) That the trustees of the corporation, when they

directed the issuance of 750,000 shares of stock in payment of a seven-eighths interest in the mine, did not actually believe that the said interest was worth the par value of said stock, namely, $7,500,000. (4) That the fair value of the seven-eighths interest in the mine at the time of the purchase by the trustees of the corporation was $125,000. (5) That the trustees of the corporation, at the time they agreed to issue all of the stock of the company to Pardee et al. in payment of a seven-eighths interest in the mine, knew, or might have ascertained by the exercise of reasonable diligence, that the par value of the stock paid for such interest was in excess of the actual value of the property purchased. (6) That the defendant Clark, in taking part at the meeting of the trustees of the corporation held on December 19, 1889, did not participate therein with the intent to relieve himself or other stock purchasers from a personal liability to the stock that he or they might acquire. (7) That from information of the mine that defendant Clark had on December 19, 1889, there was no reasonable ground to believe that a seven-eighths interest was apparently worth the amount of the par value of the shares. (8) That Clark at that time did not honestly believe that a seven-eighths interest in the mine was apparently worth the amount of the par value of the shares. (9) That the apparent value of a seven-eighths interest in the mine at that time was not the amount of the par value of the share. (10) That the defendant Kleinschmidt, in participating at the meeting of the corporation of December 19, 1889, did not intend to relieve himself or other stock purchasers from a personal liaibility on the stock that he or they might acquire.

A motion was made to the district court to reject the findings of the jury, with the exception of those numbered 6 and 10. This was denied, and all the findings of the jury were adopted by the court except 6 and 10, and in addition the court found as follows: (11) That all of the stock of

the corporation standing in the name of Kleinschmidt, with the exception of 250,000 shares, were held by him as trustee for Pardee, under the trust agreement referred to in the complaint. (12) That the remaining 250,000 shares held by said Kleinschmidt were held by him as trustee for the company, and were treasury stock, donated to the corporation by Pardee at the first meeting of its board of trustees after the agreement between him and the company by which the entire issue of the capital stock was to be paid to him for a seven-eighths interest in the mine. (13) That all the stock issued to Kleinschmidt was issued to and stood on the books of the company in the name of T. H. Kleinschmidt, trustee, and that the trust in Kleinschmidt for Pardee and the company was created by direct resolution and previous authority of the company itself, and that the company was privy to the creation of both trusts.

The learned judge who presided at the trial of the case drew the following conclusions of law: (1) That defendants Kleinschmidt and Seligman were not liable for the claim of the plaintiff; (2) that the defendant Clark was liable. What led to the exoneration of any defendants other than Clark is immaterial. The case before us presents for consideration Clark's attitude only.

We regard this action as one brought to collect from Clark, a stockholder in the Fourth of July Mining Company, a corporation organized under chapter 25 of the fifth division of the Compiled Statutes of the state of Montana (1887) the amount of a judgment debt against the corporation, under the provisions of section 457 of chapter 25.

That section provides as follows: "The stockholders of every company incorporated under the provisions of this article [chapter] shall be severally and individually liable to the creditors of the company in which they are stockholders to the amount of unpaid stock held by them respectively, for all acts of and contracts made by such company, until the

whole amount of capital stock subscribed for shall have been paid in."

The respondent's complaint is in the nature of an equitable petition, instituted in behalf of himself and all the creditors of the corporation, upon the ground that defendant holds a large amount of unpaid stock, and that by the statute he is individually liable to the amount of such unpaid stock for the acts of and contracts made by the Fourth of July Company, until enough of the capital stock held by him shall be paid in to satisfy respondent's claim. That such is the main theory upon which the respondent proceeded is evident by the pleadings, by the evidence, and by the judgment. The complaint substantially averred that defendant Clark owned 173,800 shares of the stock of the company; that 750,000 shares were transferred for a seven-eighths interest in a mine, worth no more than $75,000; and that the trustees, of whom defendant was one, knew, at the time of the conveyance of the mining interest referred to, that such seven-eighths interest was worth no more than $75,000; that the defendant and certain others, knowing that the mine was not worth more than $75,000, agreed to organize the corporation, and that the capital stock thereof should be $7,500,000; that each member of such association agreed to take, and did take, a certain number of shares in the company, at 25 cents per share; that defendant, having taken his shares with the full knowledge that the par value of the stock exchange for the mining property was grossly in excess of the true value of the property, and, having full knowledge of the transaction antecedent to the issuance of the stock, thereby became the holder of unpaid stock except in the proportion of $75,000 to $7,500,000. The prayer is to have defendants decreed to be holders of unpaid stock, and that they each pay into court the amount to which the stock held by him is unpaid, until enough shall be paid to satisfy plaintiff's claim.

These allegations were sufficient to permit plaintiff to prove

that the stock had not all been paid in, as required by section 458, div. 5, Comp. St., which is as follows: "The trustees of such company may purchase mines, manufactories and other property necessary for their business, and issue stock to the amount of the value thereof in payment thereof, and the stock so issued shall be declared and taken to be full stock, and not liable to any further call; neither shall the holders thereof be liable for any further payments under the provisions of section 457 of this chapter; but in all statements and reports of the company to be published, this stock shall not be stated or reported as being issued for cash paid into the company, but shall be reported in this respect, according to the facts." *Boynton* v. *Hatch,* 47 N. Y. 225.

The findings establish that the stock was not paid in as required, and that the seven-eighths interest in the mine was worth only 1 2-3 per cent. of the paid-up value of stock exchanged for it. Evidential matters contained in the complaint, reciting the history of the formation of the corporation and the *modus operandi*, are not inconsistent with the theory pursued, and upon which recovery was had. It may be true that plaintiff believed that actual fraud was a necessary element of his case,—that is, that, to recover, it was essential to prove that defendant intended, when the exchange of the stock for the mine was made, to relieve himself from personal liability to the stock that he might acquire; but, even so, still plaintiff should not be turned out of court unless actual fraud is necessary in order to prove the statutory liability. If fraud can be proved by showing that the managers of a corporation have advisedly issued stock for property the par value of which stock was known at the time of its issuance to be grossly in excess of the fair value of the property acquired by the company, the plaintiff, in an action to enforce the individual liability of a stockholder who has taken with full knowledge of the state of affairs, can recover upon allegations sufficient to admit such proof, even though

he has failed to prove other allegations in his pleading wherein he has charged actual intentional fraud on the part of the shareholder sued. This is upon the principle that if a plaintiff aver more than is necessary, and fail to sustain immaterial and redundant averments, but does prove all the material facts upon which a right to relief is based, and no motion to correct the pleading has been made, it will be treated as sufficient, and the surplus allegations disregarded.

Defendant's counsel, though, exaggerated the difficulty complained of. There was no misunderstanding of the real basis of plaintiff's cause of action when they wrote their supplemental brief, wherein they argue that it appears from the pleadings, and particularly from plaintiff's complaint, that plaintiff did not rely and could not have relied upon the fraud which is made the basis of this action, for the reason that plaintiff asserts his cause of action against the company is by reason of a judgment, on account of personal injuries. Again, they thus refer to plaintiff's attitude: "He invokes the rule * * * that the persons who perpetrated the fraud of which he complains are personally liable to him because of the fraud which they perpetrated, and at the same time shows that he could not have relied upon any such fraudulent misrepresentation, and that he could not have been induced to take the company as his debtor or to become the creditor of the company upon the theory that the shares of stock were fully paid up, and that the corporation had $7,500,000 worth of assets." Appellant's counsel then argue that plaintiff has not brought himself within the rule of equity which he invokes, but from which he "has expressly excluded himself by his pleading."

Respondent is not denied relief in equity. The statute imposing the individual liability upon the shareholder prescribes no remedy, and gives no form of redress. In this respect it differs from somewhat similar laws of several states; for instance, Missouri, where, under section 2517, Rev. St. Mo. 1889, execution may run directly against a shareholder for

his liability on unpaid stock, where a judgment creditor of the corporation has issued execution, and the same has been returned *nulla bona*. But the great current of authority is that creditors in such suits may go into courts of equity, which will afford adequate remedy. *Norris* v. *Johnson,* 34 Md. 485; *Harris* v. *First Parish,* 23 Pick. 112; *Crawford* v. *Rohrer,* 59 Md. 599; Thomp. Liab. Shareholders, § 258.

Having now ascertained that plaintiff and defendant are not far apart in their lines of thought as to the scope of the issues raised by the pleadings and findings, we can proceed upon the deduction that there is no reliance upon actual intentional fraud; that that theory is eliminated from the case; and that therefore, if the action can be sustained, it must be because fraud upon the law flows as a necessary legal inference from the facts that have been found.

The findings of fact adopted by the court are not attacked for insufficiency of evidence to justify them. We have, nevertheless, scrutinized the testimony in trying to arrive at a proper answer to the main legal proposition necessary to be decided. We have viewed the matter from several standpoints. We have considered that it was a mine that the corporation was giving its stock for, and that the purposes of the company were mining; also, that the value of mining property is honestly often immoderately rated by those who estimate its probable value by some slight indication of an ore body of commercial worth. We have considered the showing made by the development work on the property when the corporation was created. We have made every reasonable allowance for the unwarranted hopes of fortune that doubtless filled the minds of the defendant and his associates when they launched their enterprise upon the commercial world. We have even included allowances of fair profit to the promoter in trying to get at the fair value of the entire property as it was turned over to the company. But with all this there is nothing to contradict or shake the effect of the evidence from which it

appears so clearly that there was absolutely nothing substantial upon which any man possessed of the most ordinary business capacity could have believed that $7,500,000 was the reasonable value of a seven-eighths interest in the Fourth of July mine. It must therefore stand as true that the property which the corporation received from Pardee as full payment for the stock was worth only $125,000 when turned over to the company.

Authority to trustees of corporations to purchase mines, manufactories, and other property necesary to their business, and issue stock to the amount of the value thereof in payment therefor, which stock so issued shall be declared and taken to be full-paid stock not liable to any further calls, is a specific grant of power to buy any species of property necessary to the business of the company by paying therefor in stock; but, in exercising the authority given, the par value of the stock so issued must be put against the fair value of the property purchased. The language "to the amount of the value thereof," used in section 458, means the actual or the fairly estimated value of the property exchanged for the shares of stock delivered in payment. Constructions of the language quoted which permit any valuation to be put upon the property which the parties to the transaction please, and to issue in payment therefor stock of a par value grossly in excess of the true value of the property, we believe to be evasive and erroneous. The statute neither allows a grossly excessive value to be put upon the property sold in order to deliver it over in consideration of a large amount of stock, the par value of which is far in excess of the fair value of the property nor does it authorize property to be sold at far less than its value, in consideration of payment in stock worth on its face more than the property so acquired actually or fairly estimated is worth.

Corporations are generally formed to execute undertakings which individuals cannot carry out with safety or facility, and to avoid personal liability in execution of such projects. But

the legislature prescribes the terms of the contract entered into between the people and the incorporators. Entire immunity from individual liability is not invariably incidental to the grant of a charter or articles of corporate existence. If legal conditions are complied with by the organizers of corporations, the immunity follows as a matter of law; but, if they are not, an individual liability to the shareholders arises, imposed by the same power which granted the right of corporate existence, and whereby creditors may make their claims good. Such we believe to be the correct rule, and such we think is the doctrine announced by the courts and text writers who have reasoned upon the sounder principles of law. We shall not attempt to do more than cite a few recent cases which sustain our views in clear and unmistakable language.

The supreme court of the United States, by Justice Hunt, in *Upton* v. *Tribilcock,* 91 U. S. 45, announced this salutary rule: "The capital stock of a moneyed corporation is a fund for the payment of its debts. It is a trust fund, of which the directors are the trustees. It is a trust to be managed for the benefit of its shareholders during its life, and for the benefit of its creditors in the event of its dissolution. This duty is a sacred one, and cannot be disregarded. Its violation will not be undertaken by any just-minded man, and will not be permitted by the courts. The idea that the capital of a corporation is a football to be thrown into the market for the purpose of speculation, that its value may be elevated or depressed to advance the interests of its managers, is a modern and wicked invention. * * * The capital paid in and promised to be paid in is a fund which the trustees cannot squander or give away."

Within these principles, many courts of the highest respectability have laid down rules we have stated. The use of the term "trust fund" we approve of as understood by the late decision of the supreme court in *Hollins* v. *Iron Co.,*

150 U. S. 371, 14 Sup. Ct. 127, and as substantially followed by our court in *Ames & Frost Co.* v. *Heslett,* 19 Mont. 188, 47 Pac. 805. Speaking of property held "in trust" for creditors, Justice Brewer said in the federal case cited: "Yet all that is meant by such expressions is the existence of an equitable right which will be enforced whenever a court of equity, at the instance of a proper party and in a proper proceeding, has taken possession of the assets. It is never understood that there is a specific lien or a direct trust." There is no direct and express trust attached to the unpaid liability of a stockholder as an asset of an insolvent corporation; but an equity does arise in favor of a creditor of such a corporation which will be upheld in the creditor's favor, and which will inure to the benefit of the creditor before it will be held to belong to the separate entity, the corporation itself. A simplified way of expressing the attitude of the creditors of a corporation which is insolvent towards the corporation is to say that in such event "all the creditors are entitled in equity to have their debts paid out of the corporate property before any distribution thereof among the stockholders." *Wabash Railway Co.* v. *Ham,* 114 U. S. 587, 5 Sup. Ct. 1081. That the liability for unpaid stock is an asset of an insolvent corporation has been frequently decided. *Sanger* v. *Upton,* 91 U. S. 56; *Hawkins* v. *Glenn,* 131 U. S. 319, 9 Sup. Ct. 739; *Hatch* v. *Dana,* 101 U. S. 205; Beach Priv. Corp. § 117.

Judge Peckham, in 1890, announcing the unanimous opinion of the court in *Gamble* v. *Water Co.,* 123 N. Y. 91, 25 N. E. 201, construed the manufacturing act of that state, which is similar to section 458 of the Montana Compiled Statutes. He said: "We think that, under the manufacturing act, the company cannot issue its stock as full paid at anything less than its par value. The act makes special provision for the exercise of the power to issue stock in payment for property purchased by the company. Whatever the right of a corporation under the general powers pertaining to it as a corporation

might be, we must look to the provisions of the statute where it specifically grants such power to find the terms and conditions upon which it is to be exercised. By section 2 of chapter 40 of the laws of 1848, the trustees of a manufacturing corporation, founded under the act, are empowered to purchase property necessary for their business, and to issue stock to the amount of the value thereof in payment therefor; and the stock so issued shall be declared and taken to be full-paid stock, and not liable to any further calls. We think this language must mean that the amount of the nominal or par value of the stock must be put against the value of the property purchased; otherwise, we should have such a case as $100 in cash purchasing $100 of stock at par, under a subscription to the capital stock of the company, while the same $100, if first turned into property to be sold to the company, might purchase double the quantity of the stock if the stock were only of the actual value of 50 per centum of its par value. The stock would issue only at its actual value in return for property, but, in return for cash, it would only issue at its par value. In other words, if the stock were really worth but 50 per cent. of its par value, actual cash would purchase only half as much stock as could be purchased with an equal value in property. This was never meant. And I think the expression that the stock thus issued for property purchased is to be taken as full paid up stock, and that it is to be issued to the amount of the property purchased, must mean that it is to be issued at its par value. It may be said that this construction prevents a corporation from purchasing property and paying for it with its stock, where actual value of the stock is enough below its par value to make the difference in a large purchase very appreciable. That may be so. But it was undoubtedly the object of the statute to make the full-paid stock that is issued the representative, dollar for dollar, of the money or property that has been paid in for its

purchase, so that the company would start off in business with money or property of the full value of its paid-up capital."

The supreme court of Missouri, with no dissent, in the very late case of *Van Cleve* v. *Berkey,* 44 S. W. 743 (decided the same week that the case before us was submitted), in construing a statute permitting subscribers to pay for stock by labor done or property actually received, said: "Where the law permits subscribers to pay for stock by labor done or property actually received, it means that the corporation must receive in labor or property what it was reasonably worth in money. Corporations must own property for the purposes of their legitimate business, and, if a man contracts to take shares in the corporation, he must pay for them, to use a homely phrase, 'in meal or in malt.' He must either pay in money or in money's worth. And it is the rule laid down by the supreme court of this state, which the learned referee seems to have overlooked, that the property or labor turned into the corporation as payment for shares of stock must be a fair, just, lawful, and needed equivalent for the money subscribed."

In *Wallace* v. *Manufacturing Co.,* 73 N. W. 189 (decided in December, 1897), the supreme court of Minnesota used the following apt language: "A certificate for paid-up shares in a corporation is simply a written statement in the name of the corporation that the holder thereof is a stockholder, and that the full par value of his shares has been paid to the corporation. If the shares in fact have not been so paid for, the certificate that they have been is a false representation that the assets of the corporation have been increased to the amount of the par value of the stock so issued. And, when a corporation represents that it has a paid-up capital of a given amount, it represents to the business world that, at the time it issued the stock, it received money or property to the full par value of its stock. The issuing of the stock of a corporation as paid up when it is not so in fact is a public and a private wrong,—a cheat and a fraud,—which enables the cor-

poration to obtain credit and property by false pretenses. Ethically, the legislature might, with the same propriety, authorize an individual to misrepresent his assets for the purpose of obtaining credit as to authorize a corporation, other than a mining corporation, to issue watered stock."

In *Stout* v. *Hubbell,* 73 N. W. 1061 (decided after the case at bar was submitted), the supreme court of Iowa said: "For this court has held, as to creditors of a corporation, that when property is received by the corporation, at an excessive valuation, in payment for shares of its capital stock, it is only a payment to the extent of the value of the property received, and that owners of such stock are liable to creditors for the difference between the actual value of the property and the face value of the stock." To like effect are the somewhat older but modern decisions in *Elyton Land Co.* v. *Birmingham Warehouse & Elevator Co.,* 92 Ala. 407, 9 South. 129; *Wetherbee* v. *Baker,* 35 N. J. Eq. 501; *Bailey* v. *Coke Co.,* 69 Pa. St. 334; *Douglass* v. *Ireland,* 73 N. Y. 100; *Goodrich* v. *Dornan,* (Com. Pl.) 14 N. Y. Supp. 879; *Roman* v. *Dimmick* (Ala.) 22 South. 109.

There have been numerous contrary decisions, a leading case being *Phelan* v. *Hazard,* 5 Dill. 45 Fed. Cas. No. 11,068, cited to us by appellant. But, not stopping to distinguish the cases, the courts of the United States have not of late followed *Phelan* v. *Hazard;* and we believe it can be safely said that there has been a steady advance in later years to the view that, in exchanging stock for property under a statute similar to section 458, each must be valued honestly at its fair worth, and the amount of stock issued as paid up shall not be greater than the value of the property purchased.

This brings us to the contention that there can be no liability unless it is proven that the shareholder, in assenting to the purchase of property for stock and the overvaluation thereof, and in capitalizing the enterprise, actually intended to perpetrate a fraud upon the creditors of the corporation;

in other words, that he intended actually and by furtive motive to perpetrate a fraud. Bearing in mind always that this appellant, Clark, was one of the original parties to the purchase of the mining property referred to in the findings, and actively participated as a trustee in the company formed, and immediately thereafter became a stockholder, with full knowledge of the fact that the stock had been paid for by a seven-eighths interest in the mine, which was knowingly grossly overvalued, the application of the law becomes quite simple. Upon this question, too, there are decisions in support of the appellant's theory, but again we shall curtail the results of our investigation by observing that in the later opinions those principles obtain which we believe to be the more just to creditors generally. Upon what rational basis can it be said that the trustees or shareholders of a corporation have a right to deliberately take, in payment for the stock of the company, property intentionally and most unfairly overvalued? Where is the authority to do it? What is the justification for it in the code to which the trustees must turn? These questions are not replied to by saying that the common law permitted such a practice; for, if it did, section 458 of the laws of Montana (Comp. St. 1887), and the constitution (section 10, art. 15), do not. Certainly the common law did allow directors of a corporation to receive property or services in payment for stock, either from original subscribers or from those to whom the original subscribers sell stock; but whether the common law sanctioned an intentional gross over-valuation of property sold for stock in the corporation is, at least, doubtful. To pursue that inquiry, however, is not important, for the statute (section 458) is the specific grant of power under which the conditions are prescribed as to when the stock is paid up when it has been issued for property, and to that directors and shareholders must look for a guide in their conduct in and about such transactions, while section 457 creates the liability.

In *Terry* v. *Little,* 101 U. S. 216, Chief Justice Waite said: "The individual liability of stockholders in a corporation is always a creature of statute. It does not exist at common law. The first thing to be determined in all such cases is therefore, what liability has been created?"

In *Camden* v. *Stuart,* 144 U. S. 104, 12 Sup. Ct. 585, Justice Brown clears up evident misapprehension of the former decisions of that court by the following statement: "In view of our decisions in *Sawyer* v. *Hoag,* 17 Wall. 610, *Scovill* v. *Thayer,* 105 U. S. 143, and the numerous cases arising out of the failure of the Great Western Insurance Company, it is manifest that the resolution adopted at the directors' meeting of December 29, 1880, that, upon paying $4,000 or their proportions of the same, the capital stock of $150,000 should be deemed to be fully paid, was wholly ineffectual as against the creditors of the company. It is the settled doctrine of this court that the trust arising in favor of creditors by subscriptions to the stock of a corporation cannot be defeated by a simulated payment of such subscription, nor by any device short of an actual payment in good faith. And, while any settlement or satisfaction of such subscription may be good as between the corporation and the stockholders, it is unavailing as against the claims of the creditors. Nothing that was said in the recent cases of *Clark* v. *Bever,* 139 U. S. 96, 11 Sup. Ct. 468, *Fogg* v. *Blair,* 139 U. S. 118, 11 Sup. Ct. 476, or *Handley* v. *Stutz,* 139 U. S. 417, 11 Sup. Ct. 530, was intended to overrule or qualify in any way the wholesome principle adopted by this court in the earlier cases, especially as applied to the original subscribers to stock. The later cases were only intended to draw a line beyond which the court was unwilling to go in affixing a liability upon those who had purchased stock of the corporation, or had taken it in good faith in satisfaction of their demands."

And in *Lloyd* v. *Preston,* 146 U. S. 630, 13 Sup. Ct. 131, it was held a *bona fide* creditor of a corporation could enforce

actual payment by the subscribers to the capital stock of the company where the evidence was convincing that the overvaluation of the property transferred to the railway company in pretended payment of the subscription to the capital stock was so gross and obvious as, in connection with other facts, clearly established a case of fraud.

It is not necessary to show an actual fraudulent intent in order to establish a legal fraud. "Simulated payments," as the supreme court in *Handley* v. *Stutz,* 139 U. S. 417, 11 Sup. Ct. 530, calls payments of subscriptions to capital stock where property is grossly and obviously overvalued, do not constitute excuses for defeating the trusts arising in favor of the creditors of a corporation.

The quantum of proof essential in actions similar to this one has been directly considered by several courts. In *Douglass* v. *Ireland,* 73 N. Y. 100, it was said: "A deliberate and advised overvaluation of property * * * is a fraud upon the law. * * * It is in direct violation of the policy as well as of the terms of the law, which demands payment either in money or property at its value of all the capital stock of the company as a condition of immunity to the stockholders from liability for debts of the corporation. The payment of an amount for property in excess of its value * * * does not depend upon any fraudulent intent other than that which is evidenced by the act of knowingly issuing stock for property to an amount in excess of its value. All that is necessary to establish the legal fraud and take the stock issued out of the immunity assured to stock honestly issued * * * is to prove two facts: (1) That the stock issued exceeded in amount the value of the property in exchange for which it was issued, and (2) that the trustees deliberately, and with knowledge of the real value of the property, overvalued it, and paid in stock for it an amount which they knew was in excess of its actual value."

The property in that case was worth $68,000, the capital

stock issued being $300,000. This case last cited was approved of in the later case of *National Tube Works Co.* v. *Gilfillan,* 124 N. Y. 302, 26 N. E. 538. There the property was found to be worth $75,000, but it was procured by giving $300,000 worth of stock for it. The court approved of a charge to the jury directing them that "the fraud is consummated by the issue of stock as full-paid stock which has not been fully paid; and it does not depend upon any fraudulent intent other than that which is evidenced by the act of knowingly issuing stock for the property in an amount in excess of its value. All that is necessary to establish legal fraud is proved in two facts," etc. The court even went to the extent of holding that there is "no exemption from liability because credit was imprudently given by the creditor, or because he supposed that the property of the corporation was sufficient to pay its debt."

The New York cases are approvingly upheld in the very able opinion of the supreme court of Missouri in *Van Cleve* v. *Berkey, supra,* where the court said it was satisfied that the weight of American authority was against the appellants' contention on the facts of that case, and that the appellants were liable without other proof of fraud than was afforded by the transaction itself. The transaction spoken of was this: A corporation was organized under the laws of Illinois, and was to have a capital of $100,000, subscribed by the parties in interest to whom the full amount of stock as subscribed was issued as full paid, in consideration of a transfer to the corporation of an invention of little actual value. The evidence showed that all the defendants acted in good faith so far as their actual intentions were concerned, and none of them was moved by any actual fraudulent intent in the transaction. About 10 per cent. of the amount subscribed was advanced by the original subscribers, but one B. received $90,000 of the capital stock of the corporation for an invention.

Upon the question of fraud the case is parallel to this. The

court also adopts the language of the supreme court of Alabama in *Elyton Land Co.* v. *Birmingham Warehouse & Elevator Co.*, 92 Ala. 423, 9 South. 129, disapproving of the statements made by Mr. Cook, in section 47, of his book on Stocks, Stockholders and Corporation Law, to the effect that attempts made, in instances where stock was issued for the property taken at an overvaluation, to hold the party receiving such stock liable for its full par value less the actual value of the property received from him, have usually been unsuccessful.

The supreme court of Nebraska in *Gilkie-Anson Co.* v. *Dawson Town & Gas Co.*, 64 N. W. 981, expressly lay down what is sufficient proof in accordance with the New York decisions. Judge Harrison, for the court, said: "Where an agreement is made whereby stock is knowingly and advisedly issued as paid in full, though but partially paid for, it may be set aside by creditors, and the enforcement of payment in full of the subscription for the stock obtained for the satisfaction of the debts of the corporation. * * * Where property is conveyed to a corporation as payment of a subscription for stock, it is insufficient to satisfy the liability of subscribers to the creditors of the corporation if there has been a fraudulent overvaluation of the property,—an overvaluation knowingly and advisedly made."

Clark on Corporations, in a logical discussion of the proposition, says that the better opinion is that an actual fraudulent intent need not be shown in order that the person who pays for his stock in property may be held liable to creditors onthe ground that the property was overvalued. His summary of the law is as follows: "Laying aside all questions as to whether there is an actual intention to defraud, such transaction would be a fraud in law, both upon dissenting stockholders and upon persons dealing with the corporation on the faith of its stock being fully paid up, and it would be just as invalid as against creditors as a payment for stock in money at

a discount. If the nature of the property and the extent of the overvaluation are such that the overvaluation may possibly have been due to error of judgment, then, to render the transaction invalid as against creditors, actual fraud must be shown, and the question is one of fact. If, on the other hand, the overvaluation is so gross and obvious that it could not have been due to mere error of judgment, the transaction will be held fraudulent as a matter of law. This seems to be the fair result of the cases, if the opinions are read in the light of the facts actually before the court."

In *Northwestern Mut. Life Ins. Co.* v. *Cotton Exchange Real Estate Co.*, 46 Fed. 22 (decided in 1891), a bill was brought by a judgment creditor of a corporation, alleging, in substance, that the stock of the corporation of the value of $125,000 was paid by conveying a lot and building at a valuation of $200,000, but which in reality was only worth $157,000. The bonds of the corporation, secured by mortgage on the building, were issued to the defendants to make up the deficit, the defendants being stockholders and directors in the company which owned the building and made the conveyance, and they personally knew of the overvaluation, and were benefited by it. The same arguments were advanced before Judge Thayer that are usually advanced in like cases, namely, that the bill did not show that there was any fraud in the transaction by which the stock was paid for, inasmuch as it did not aver that the stock was intentionally overvalued. Judge Thayer decided that the persons to whom the stock was issued were aware of the overvaluation, and, although the bill was said to show no actual fraud in the transaction, the court regarded an intentional overvaluation of property to the extent and made under the circumstances disclosed by the bill, as fraudulent, "in the sense that a complainant is bound to allege and prove fraud. * * * The law regards such a transaction as constructively fraudulent so far as the corporation's creditors are concerned; or, to state the proposition in a

different form, the payment of a stock subscription in such manner and under such circumstances is invalid, and not binding on a creditor of the corporation, and, where the law determines the quality of a transaction described,in a pleading it is unnecessary to aver that it was invalid or fraudulent." The learned judge who decided the last referred to case had before him, and which was binding upon him, the case of *Coit* v. *Amalgamating Co.*, 119 U. S. 343, 7 Sup. Ct. 231 (decided in 1886), which is quoted as holding to the doctrine that actual fraud, as heretofore defined, must be shown by a creditor seeking to fix the individual liability of a shareholder. But it is plain that nothing in that decision was regarded as inconsistent with the rule laid down in the New York decisions heretofore cited. *Coit* v. *Amalgamating Co.* was an action by a judgment creditor against the defendant company to compel the stockholders to pay what he claimed was due and unpaid on the shares of the capital stock held by them. The capital stock was fixed at $100,000 and the property was turned over for that amount of stock. It was said that, although "the corporators may have placed too high an estimate upon the property, its valuation was honestly and fairly made." The court, after saying that, where full-paid stock is issued for property received, there must be actual fraud in the transaction to call stockholders to account, added: "A gross and obvious overvaluation of the property would be strong evidence of fraud." We fail to see where this language at all conflicts with the opinion of Judge Thayer in *Northwestern Mut. Life Ins. Co.* v. *Cotton Exchange Real Estate Co., supra,* or with our own view that when there is superadded to a gross and obvious overvaluation the element of deliberation in having grossly overvalued the property, and knowledge in having done so, fraud is a necessary legal inference from such facts, for in such a case good faith in valuing the property is entirely wanting. It is a fraud upon the law.

So, also, in *Thayer* v. *El Pomo Mining Co.*, 40 Ill. App.

344, it was decided that the stockholders in an insolvent corporation were liable to creditors unless they had given for their stock "the equivalent of money or in money's worth." That was a mining case, and the corporation was organized with a capital of $1,000,000, divided into $10 shares. The appellant recovered a judgment against the corporation, which, being unsatisfied, he sought to make good under the statutes making the stock of shareholders liable. The property transferred to the corporation was worth but little more than 10 per cent. of the amount of the stock of the company. There, as in the case at bar, it was considered a fair conclusion that none of the incorporators had any idea that the property was worth a million dollars, but adopted that sum as a convenient one for the amount of stock to be issued. As between themselves, connected with the organization, the court said there could be no ground of complaint; but, as to creditors, the law regarded the nominal capital of the company, besides its actual assets, as a fund to which they might look for satisfaction. From many former cases in Illinois the rule was deduced that the stockholders of an insolvent corporation will be liable to creditors unless there has been given for the stock the equivalent of money or in money's worth. "No fiction," say the court, "however innocently adopted, is a defense against creditors." In the latest decisions in Illinois,—*Coleman* v. *Howe* (1895) 154 Ill. 458, 39 N. E. 725,—entire good faith in valuing property is required, and "where the overvaluation is so great that the fraudulent intent appears on its face, and is not explained, the court will hold it to be fraudulent as a matter of law."

In *Elyton Land Co.* v. *Birmingham Warehouse & Elevator Co., supra,* it was held that the absence of fraudulent motive on the part of a trustee does not give validity to a mere simulated execution of the trust. An averment of fraud in reference thereto is unnecessary.

In the expression of the foregoing views of our own, and

those adopted by us from other courts, we do not mean to be understood as going to the extent of holding that a stockholder may be successfully charged by the creditor of a corporation as a holder of unpaid stock where the property given in exchange for the stock does not eventually prove to be as valuable as it was believed to be at the time of the transfer, nor that unwise judgment or indiscretion alone are sufficient. The judgment of men is too apt to be erroneous in relation to the valuations of property. This is especially true in new countries, where mining excitements frequently prevail, and values fluctuate rapidly and to an unusual extent. An honest mistake of judgment would seem to be a complete defense to such an action, but no such feature is presented in the case under consideration. Good faith in the valuation put upon the property is what the law demands, and all that it demands. By good faith is meant actual belief in the value put upon the property,—the belief that a prudent and sensible business man would hold in the ordinary conduct of his own business affairs. Beliefs based upon visionary speculative hopes, unwarranted by existing conditions or facts, and without reasonable evidence from the then present appearances, are not such beliefs as will relieve the shareholders. Such is the true rule, we think, and such is the one that the law intends shall be applied.

Higher authority than the statutes also exists to prohibit a corporation's issuing stock except for property actually received. The constitution of the state (section 10, art. 15) provides as follows: "No corporation shall issue stocks or bonds, except for labor done, services performed, or money and property actually received; and all fictitious increase of stock or indebtedness shall be void. The stock of corporations shall not be increased except in pursuance of general law, nor without the consent of the persons holding a majority of the stock first obtained at a meeting held after at least thirty days' notice given in pursuance of law."

In *Elyton Land Co.* v. *Birmingham Warehouse & Elevator Co., supra,* a clause in the constitution of Alabama, almost identical with section 10 quoted, was construed as effective against transfers of property deliberately and intentionally overvalued to corporations for their stock. We approve of this construction.

The constitution of Missouri (article 12, § 8) contains a substantially similar clause; and in *Van Cleve* v. *Berkey, supra,* the supreme court decided it applied to a case like the one before us, saying: "It is impossible to escape the conviction that in this state, whatever may be the case in some of the other states, the 'American trust doctrine,' as suggested by Mr. Justice Harlan, has indeed been reinforced by its constitution and statutes, and that the proposition that the stock of a corporation must be paid for 'in meal or in malt,'—in money or in money's worth—is not a mere figure of speech, but really has the significance of its terms; it may be paid for in property, but in such case the property must be the fair equivalent in value to the par value of the stock issued therefor; that it is the duty of the stockholders to see that it possesses such value; that when a corporation is sent forth into the commercial world, accredited by them as possessed of a capital in money, or its equivalent in property, equal to the par value of its capital stock, every person dealing with it, unless otherwise advised, has a right to extend credit to it on the faith of the fact that its capital stock has been so paid for, and that the money, or its equivalent in property, will be forthcoming to respond to their legitimate demands,—in short, that it is the duty of the stockholder, and not the creditor, to see that it is so paid."

Earnestly have appellant's counsel sought to convince us that mining corporations are *sui generis,* and that the doctrine of liability of shareholders for unpaid subscriptions, when stock has been issued for property at an overvaluation, is not

applicable to such bodies. To fortify their arguments, they rely upon Judge Hoffman's opinion *in Re South Mountain Consol. Min. Co.*, 7 Sawy. 30, 5 Fed. 403, and the opinion by Judge Sawyer in the same case, reported again in 8 Sawy. 366, 14 Fed. 347. The foundation of Judge Hoffman's remarks is based upon two notions: (1) That the amount of the capital stock of a mining corporation is usually fixed at a purely arbitrary sum, and divided into as many shares as convenience or caprice may dictate; and (2) that the capital stock of a mining company neither bears nor is intended to bear the slightest relation to the real value of the property,—"a value nearly always conjectural, and very often imaginary." A complete answer to both points lies (1) in the constitutional provision of this state which says that "no corporation shall issue stocks except for * * * money or property actually received;" and (2) in the law (section 458, div. 5, Comp. St. 1887) wherein the grant of power to the trustees of a corporation to purchase mines necessary for their business enables them to issue stock to the amount of the value thereof, which stock so issued shall be declared and taken to be the full-paid stock, and not liable to any further call. There was no such statute in California when the cases cited were decided, and, so far as we are advised, it does not appear that the court considered the effect of the constitutional prohibition of that state (section 11, art. 12) against issuing stock except for property actually received. Judge Sawyer also wrote of the common custom, and said that mining corporations in California were organized and carried on upon principles in respect of their capital stock wholly different from banking and like commercial corporations having a subscribed capital stock. No reference is made to statutory rules fixing liability for unpaid shares, or extending authority to buy mines. Custom and common knowledge allowed and looked for any capitalization of a mining company,

and nothing to the contrary justified the court in holding against the weight of these arguments. Such is fairly the quite persuasive reasoning of the learned judge.

Morawetz, in his valuable book (Priv. Corp. § 830), cites these two decisions, and sustains their doctrine in the following language: "While the customs of business men with regard to the methods of organizing and managing particular classes of corporations cannot control the established rules of law, such customs must often be taken into consideration in construing agreements made in view of the prevailing condition of affairs. Thus, it has long been the general practice both in New York and in California to organize mining corporations with a nominal capital bearing little or no relation to the real capital which the shareholders propose to contribute, and to issue the entire stock as fully paid up in consideration of mines whose market value is much below the amount of the stock so issued, and whose real value is generally nothing. This practice is so universal and so notorious that a person who contracts with any ordinary mining company may usually be presumed to have contracted with a view only to such security as the property transferred to the company may furnish, irrespective of the capital indicated by its charter. A person so contracting would therefore have no equitable claim against the shareholders for unpaid capital if their shares were declared paid up as between themselves and the company. It is to be observed, also, that the nominal capital of a mining company, by the very nature of the mining business, cannot, as a rule, furnish an indication of the company's actual capital. The property of a mining company is naturally of an extremely fluctuating and uncertain character. Moreover, it is acquired for the sole purpose of being exhausted and distributed among the shareholders in the form of dividends, and not as a permanent fund with which to carry on business."

The intimation that New York, like California, excepts

shareholders in mining corporations from statutory liability, is inadvertent, for *Douglass* v. *Ireland, supra,* involved the responsibility of shareholders in a corporation for furnace and mining purposes. The two California cases alone uphold the text. As said before, however, those cases were not decided on statutes similar to the New York manufacturing act, quoted in *Boynton* v. *Hatch,* 47 N. Y. 225, and identical with the Montana statutes, and for this reason are not wholly pertinent. But we go farther, and are constrained to overthrow their fallacious doctrine of expediency, and to rest our decision upon the law as it is written, and upon the common principles of moral honesty, within its letter and its spirit.

Sifted of specious consideration addressed to judges to regard practices long prevalent in certain mining states, where no laws existed placing mining and manufacturing corporations on an equality, and the warped doctrine we are asked to lay down leads to this: Incorporators of mining companies should be permitted to violate the law, and deliberately deceive the public, but the incorporators of manufacturing enterprises should not, and this notwithstanding the truth that the same specific statutes grant no greater powers to one than the other, and fix the same liabilities upon the shareholders in each.

Counsel assert positively that there is no such thing as the market value of a mine. This court said in *Montana Railway Co.* v. *Warren,* 6 Mont. 275, 12 Pac. 641, that even a prospect has a value. "The only questions are whether a prospect has a value that may in law be called a market value, and, if so, whether there is proof in this case of any market value. Has a 'prospect'—an undeveloped mine—any market value? A full, positive answer to that is that 'prospects' are sold in the market every day. Certainly, property so sold has a market value. The records of Silver Bow county will probably show more transfers by sale of property, such as is known as 'prospects,' than of any other kind of real estate. They

are frequently sold upon execution, foreclosure, and partition sales. They are subject to daily litigation in our courts." These remarks were "well said," wrote Justice Brewer in affirming that decision in 137 U. S. 348, 11 Sup. Ct. 96. Its holding was also followed in *Maloy* v. *Berkin,* 11 Mont. 138, 27 Pac. 442, and *Railway Co.* v. *Forbis,* 15 Mont. 452, 39 Pac. 571, and a like rule reiterated in *O'Keefe* v. *Dyer,* 20 Mont. 477, 52 Pac. 196. The rationale of the California cases can also be accounted for, not only by an absence of statutory conditions which confront the incorporators of mining companies in Montana, but by remembering that when the opinions of Judges Sawyer and Hoffman were delivered, in 1881, and 1882, the science of mining in Western America was and had been far behind its present systematism. The engineer of mines was by no means so accessible or so well informed by knowledge of past experience of development in mines in this country as he has since become, and the light of his professional learning was not nearly so universally spread. It was only a few years before those decisions were pronounced that the universities of America first conferred degrees for proficiency in special courses in mining. In such surroundings, and amid the fewer opportunities for ascertaining with reasonable reliability the value of a mine, the custom of which the California judges wrote sprung up in the early days of California; and, because of its well-known origin and hold, the law and the courts were reluctant to interfere with it. But that it was a pernicious custom is indisputable. It led to deceit, and to fictitious estimates being placed on mining property by the incorporators, for their own gain. Shares in a mine, at a few cents each, allured the unsuspecting and venturesome. The experiences of the custom are filled with disappointment and ruin to investors, rich and poor. All these matters may have been the controlling reason for the adoption of the more honest policy of our laws. Judge Buck,

whose opinion as a district judge was read to us on the argument of this case, adverted to the argument of custom in this way: "This custom has made the very word 'mine' in financial centers of the world almost synonymous with conspiracy to defraud. The caution of capital has become so trepid that I believe it is no exaggeration to state that many a half-worked rich mine lies idle to-day in the mountains of this state through this cause alone."

The supreme court of Utah, in *Salt Lake Hardware Co.* v. *Tintic Milling Co.*, 45 Pac. 200, makes no exception in favor of mining corporations; nor does the supreme court of Illinois, in *Thayer* v. *Mining Co., supra;* nor does the supreme court of Wisconsin, in *Gogebic Inv. Co.* v. *Iron Chief Min. Co.*, 47 N. W. 726; nor does the supreme court of Iowa, in *Oliphant* v. *Mining Co.*, 63 Iowa, 332, 19 N. W. 212; nor does the supreme court of Oregon, in *Hodges* v. *Mining Co.*, 9 Or. 200; nor does the court of appeals in New York, in *Douglass* v. *Ireland, supra.*

But, whatever may have been the reason of the old system, things have changed. Estimating the value of a mine is no longer the result of hasty conjecture. Former methods have given way to scientific tests, based upon geological conditions, underground surveys and measurements, careful examinations of ore in sight, the known history of ore bodies in the vicinity, the method and cost of treatment of the ore, together with facilities for its transporation to markets. Now, too, there is a known definition of rights which the courts have step by step established in expounding principles by which the miner shall have preserved to him the greatest benefit of his discovery. These reasons may likewise have weighed with the legislature when it refused to extend greater immunity to stockholders in mining than in certain other corporations formed under the laws of the state.

It is next contended that it does not appear that appellant, Clark, was a subscriber, or had ever agreed to become a sub-

scriber to any stock. This is upon the theory that there is no actual contract to pay on the part of the shareholders who accept stock in mining corporations as full-paid without having signed a formal subscription for the same. Section 457, heretofore quoted, imposes the liability of shareholders to creditors, to the amount of unpaid stock, for all acts of and contracts made by the company. Section 458, *supra*, provides that stock issued in payment for the mining property, to the amount of the value of the property, shall not "be liable for any further payments under the provisions of Section 457." To give any effect at all to this clause, stock issued in payment of mining property must be included. This is obvious. It cannot mean liability to the shareholder in a manufacturing, and exemption to stockholder in a mining company. Failure to have signed a formal stock subscription list cannot relieve appellant. The stock was issued to him, and, with knowledge of all the surrounding facts, he became the holder of it. This was enough. See the late case of *Smith* v. *Railway Co.* (Cal.) 51 Pac. 710. Where stock has been issued, the holder has impliedly subscribed for it. If it has not been issued, yet he has subscribed to a formal subscription list, agreeing to take it. As such subscriber, he may be deemed liable to the amount for which it is unpaid. Tayl. Corp. § 511. The supreme court of Iowa, in *Jackson v. Traer,* 20 N. W. 764, held that the simple acceptance of stock by one who never became a stockholder by subscription rendered the holder liable. Where the person sought to be charged has already taken the stock by an acceptance of the certificates, the need of a written agreement to do that which he has done is dispensed with, and the relation of shareholder exists. *Shickle* v. *Watts,* 94 Mo. 410, 7 S. W. 274; *Lloyd* v. *Preston,* 146 U. S. 630, 13 Sup. Ct. 131; *Webster* v. *Upton,* 91 U. S. 65.

Appellant says that plaintiff cannot recover upon the theory that there has been a fraudulent overvaluation of the prop-

erty, because his cause of action arises out of tort, and not out of contract. This revives the argument already considered and disposed of,—that, to recover, plaintiff must show that he relied upon the fraudulent overvaluation of the mine. Counsel overlook the full significance of the language of the statute, whereby the liability exists, not for debts due by the corporation, but for all acts of and contracts made by it. Spell. Priv. Corp. § 909, says that damages arising from the commission of torts by a corporation's agent cannot be recovered where the liability is for debts only; but, where the terms "debts" and "liabilities" are used, "the combination seems sufficiently comprehensive to include all acts and species of obligation and wrong for which a civil action would lie, except such as are purely penal in character." "All acts of and contracts by the corporation" are very comprehensive words, and certainly afford no ground whereon the courts can exclude acts of wrong independent of contract. In an early case in New York (*Heacock* v. *Sherman*, 14 Wend. 58) the word "debt" was regarded as limited to claims arising out of contract, but the court was of opinion that the word "demand" by itself would include a claim for damages arising out of the wrong of the corporation. Many statutes imposing this individual liability upon shareholders fix it only for payment of debts contracted by the corporation; but in section 457, as if to overcome the restrictions put upon the meaning of the term "debt" by the courts, the legislature has avoided the use of any such legal technical word, and extended the liability for all acts of, as well as all contracts by, the company. The statute cannot be evaded. Liability for acts of the corporation plainly includes liability for claims for damages consequent upon torts. *Powell* v. *Railway Co.*, 36 Fed. 726. Plaintiff, claiming in tort, had to fix his claim as a creditor in order to avail himself of his remedy; hence it was obligatory upon him to first establish his claim against the corporation. We regard the liability of the shareholders under our

statutes as secondary, not primary. They cannot be held until it appears that the corporation is insolvent. Thompson on Corporations (section 3521) writes that regularly the creditor, before invoking the aid of a court of equity, must have exhausted his remedy at law; "and the usual proof of his having done so is the recovery of a judgment, and the return of an execution *nulla bona.*" To like effect is Spell. Priv. Corp. § 904. This appears to us to be just and equitable. *Powell* v. *Railway Co., supra.*

What we have already said refutes the final argument of appellant,—that, if plaintiff relies upon the statutes his action is upon a liability created by statute; hence his remedy is barred by the statute of limitations. Comp. St. 1887, div. 1, § 42, and laws 1893, p. 50. Respondent was injured May 26, 1891. He recovered a judgment June 28, 1894, and instituted this action August 13, 1894. When plaintiff sued for damages for his injuries, he sued the company. His claim was thereafter merged in a judgment against the corporation. Now as a judgment creditor, he is suing other defendants,—individual stockholders,—to make them pay the amount of his judgment. But, as the shareholders are only secondarily liable, they could not have been proceeded against on an unliquidated demand until the judgment against the corporation was taken, or the demand was liquidated, and the company was insolvent. *Powell* v. *Railway Co., supra.* The better rule in such cases is that no cause of action accrues against the shareholder until the creditor has failed to make the amount of his judgment or ascertained claim from the assets of the company, or unless, perhaps, in certain cases, it appears to be useless to proceed against the corporation. *Hawkins* v. *Glenn,* 131 U. S. 319, 9 Sup. Ct. 739; *Scovill* v. *Thayer,* 105 U. S. 143.

Several minor errors are assigned. They have been attentively examined, but are not well founded, and require no discussion. The conclusions we have reached in this case are

in accord with those bolder interpretations which uphold, rather than impair, the letter of the constitution and the laws of the state. Enforcement of the liability in this, the first action brought before this court involving the important questions considered and determined, may be a hardship; yet the policy upon which the statutes are founded is most wholesome. In the course of the history of the state, the maintenance of those principles which we have followed will intercept the further growth of a system by which "wildcat" corporations have done grievous wrong to the public generally.

The law has said to the incorporators of mines: "You must not issue as paid in more stock in exchange for property taken than will fairly represent what the property is worth. It thus exacts no more from you than it does from the incorporators of manufacturing schemes. You must be fair and honest in valuing your mining properties, so that your capital stock may be assumed to represent what is actually paid in. It requires no impossibilities from you, but it insists on identically the same good faith from you as a miner that it calls for from your neighbor as a manufacturer. By obeying its commands, you are perfectly free from individual liability; but, by palpably and advisedly evading them, you run the risks consequent upon your evasion."

The judgment and order appealed from are affirmed.

Affirmed.

PEMBERTON, C. J., and PIGOTT, J., concur.

WALKER BROS. v. SIMON BAMBERGER ET AL.

(17 Utah 239; 54 Pac. 108. Supreme Court. July 9, 1898.)

Option with or without consideration. An offer to sell property, or to transfer a chose in action, with an agreement to keep the offer open until a day named, or for a reasonable time, during which the person to whom it is made may accept, will be binding if a consideration for so doing is given; otherwise it will not.

Statute of frauds. An agreement to sell personal property or things in action at a price not less than $200 is invalid unless the same, or some memorandum thereof, is reduced to writing and signed, or the buyer accepts and receives part of such property or the evidence of such things in action, or pay at the time part of the purchase money.

Performance complete. Where an option, not reduced to writing, on an option, is taken, and all its terms are complied with, the transaction will be taken out of the statute of frauds, and be regarded as valid.

No notice. A contract not brought to the notice of those holding stock in escrow until after they have delivered it in pursuance of the terms of the contract under which they hold will not be valid, even though the contract might have been valid if brought to their notice before delivery.

Escrow holder may force interpleader. Where persons hold stock in escrow, to be delivered in accordance with the terms of an option, and no collusion appears, they may require the parties interested to interplead and litigate the conflicting claims between themselves.

Courts of equity may grant amendments to make the complaint conform to the proofs when all the parties have been permitted to introduce their evidence on the issues as presented by the amendments, and when the court can see that no injustice could result. (Syllabus by the Court.)

Appeal from District Court, Salt Lake County; Ogden Hiles, Judge.

For construction of the statute in re transfer of possessory claims, see *Moore* v. *Hamerstag*, 18 M. R. 256. As to prospecting contracts: *Craw* v. *Wilson*, 18 M. R. 244.

Where plaintiff does not seek specific performance of the oral contract but only damages for its breach, the statute of frauds has no application. *Heilman* v. *Weinman*, 139 Pa. 143; 21 Atl. 29.

Action by Walker Bros. against Simon Bamberger, W. S. Fugate, and another. From the decree rendered, defendants Bamberger and Fugate appeal. Modified.

J. L. RAWLINS, E. B. CRITCHLOW, and BROWN & HENDERSON, for appellants Bamberger and Fugate.

BENNETT, HARKNESS, HOWAT, BRADLEY & RICHARDS and DICKSON, ELLIS & ELLIS, for respondent J. R. Walker, Jr.

S. MCDOWALL, for respondents Walker Bros.

ZANE, C. J. It appears from this record that J. C. Conklin and five others were on October 26, 1896, the several owners of stock in the Omaha Gold-Mining Company, aggregating 179,300 shares, and on that day they entered into an agreement with defendant Fugate whereby they gave him the option to purchase the same at any time on or prior to November 28, 1896, by paying 3.65 cents per share at Walker Bros. Bank,—the amount due the respective owners to be credited according to an agreement with Fugate; and in pursuance of their agreement they placed the same with the

Parol proof admissible always of executed contract to protect lessee in keeping what was taken by verbal authority. *Coe* v. *Griggs*, 76 Mo. 619.

Under contract from mine owner to merchant to deliver ore as mined under bill of sale, title vests on delivery. *Finding* v. *Hartman*, 17 M. R. 333.

A contract to be void under the clause of the statute must be such that it cannot be performed within one year. *Treat* v. *Hiles*, 68 Wis. 344; 32 N. W. 517.

Strangers can take no advantage of the fact that contract between third parties was verbal. *Book* v. *Justice Co.* 17 M. R. 617. *Murray Hill Co.* v. *Havenor*, 24 Utah 73; 21 M. R. —.

Bill of sale of proceeds of clean up without delivery of possession, held void. *Johnson* v. *Sage*, 4 Idaho 758; 44 Pac. 641.

Unsigned paper no contract. A contract to procure an agreement, means a written agreement. *Hennessy* v. *Bond*, 77 Fed. 403.

bank, with directions to deliver it to Fugate, or to his order, according to an agreement duly signed by them and by Fugate, as follows:

"Walker Bros.—Gentlemen: Inclosed are 179,300 shares of stock in the Omaha Gold-Mining Company. If, on or before November 28, 1896, W. S. Fugate pays you, or causes to be paid for the credit of the parties mentioned below, the sum of 3 and 65-100 cents per share for all the stock herein inclosed, please deliver said stock to him or his order, and credit each party to this escrow the amount set opposite his name. If he fails to make the above-mentioned payment on or before the time mentioned, return the stock to us, as per list below."

The list consisted of the names of the respective owners, the number of shares owned by each, with the aggregate to be paid them respectively. No consideration appears for the agreement of the owners to keep their offer open until November 28, 1896, but all parties insist upon it, and we must recognize it as binding. It further appears that on November 5, 1896, Fugate and defendant Walker agreed that the latter should have a reasonable time in which to do development work on the mining claim at his own cost, to deter-

Estoppel against lessor to plead after allowing tenant to improve. *Witman* v. *Reading*, 191 Pa. 134; 43 Atl. 140.

A parol promise by a mining company to pay the board of its miners is not within the statute. *Baldwin Co.* v. *Davis*, 15 Colo. App. 371; 62 Pac. 1041. *Cerrusite M. Co.* v. *Steele*, 17 Colo. App. —; 22 M. R. —.

Possession to avail to defeat the statute must be taken under the terms of the contract. A previous possession held insufficient. *Eberville* v. *Leadville Co.* 28 Colo. 241; 64 Pac. 200.

Receipt of a check containing the words, "part payment on coal lands" is not sufficient memorandum to take a contract out of the statute. *Thompson* v. *New South Co.* 135 Ala. 630; 34 So. 31.

The statute of frauds must be pleaded unless the defense is apparent on the complaint. *Bannatyne* v. *Florence Co.* 28 N. Y. Sup. 334. *Cerrusite M. Co.* v. *Steele*, (Colo. App.) 70 Pac. 1091.

mine the quality of its ore, and to decide upon the purchase by him of the former's option. The terms of Walker's option to purchase Fugate's option, more definitely stated, were that the former should pay the sum of 3.65 per share for all the stock mentioned in the option to the latter, and place to the credit of the owners of the stock the sums coming to them, respectively, and a further sum of $150 to Fugate, and, without cost to him, deliver to him 24,700 shares of the stock, and do the development work without delay. Thus, it appears the first option was by the owners of the stock to Fugate, and the second was by him to Walker. The latter was an option on an option.

The appellants rely upon the statute of frauds, and insist that the option given to defendant Walker was a right to accept an offer to sell him certain mining stock, or, in other words, a right to it by complying with the terms of his option. Walker's option gave him the right, on the terms of his option, to take Fugate's right to elect on the terms of his option. Fugate intended to transfer his option to Walker for the consideration mentioned in their oral contract or option. The statute embraces, as we shall see, "things in action." The right which the appellants had to elect was a thing in election, and by the election their right would become a right in action,—"a thing in action," according to the phraseology of the statute,—but not a right to a thing in possession. At the time the option to Walker was given, Fugate made the following memorandum:

"Salt Lake City, Utah, Nov. 5, 1896. You to take up stock now in escrow in Walker Bros.' Bank, 177,000 shares at .03 and 65-100 cents per share; take care of 24,700 shares of stock for me, and pay $150.00. W. S. Fugate.

"To J. R. Walker, Jr."

This memorandum is signed by Fugate, and it contains the name of the party to whom it was given. The escrow or writ-

ten option to Fugate, and the description and amount of the stock, and the consideration to be given by Walker are mentioned. While the names of the parties are mentioned, and, by reference to the written agreement in the bank (or the "escrow," as it is termed), the option to Fugate, and the consideration to be paid by Walker is correctly stated, so far as it goes, yet neither the agreement on the part of Fugate to keep his offer to Walker open a reasonable time, or any length of time, nor the agreement on the part of Walker to do the development work, is mentioned. Those two essential averments of the oral agreement between them are not mentioned in the memorandum. In the paper signed by appellant Fugate there is no sufficient memorandum of the option to Walker on the option given by the owners of the stock. And, if the paper signed had contained the memorandum of the oral agreement on the part of the appellant Fugate to keep the offer open a reasonable time, it would not have bound him, without a memorandum of a consideration for it. If a person offers to sell a piece of property to another, or to transfer a chose in action, and agrees to keep the offer open to a given day, or for a reasonable time, during which the person to whom it is made may accept, that is an option; and the person making the offer will be bound to keep it open if a sufficient consideration for so doing is given, but he will not be bound without such a consideration. *Litz* v. *Goosling* (Ky. Ct. App.) 22 Lawy. Rep. Ann. 127 and note (19 S. W. 527); *Weaver* v. *Burr* (W. Va.) 8 S. E. 743; *Bradford* v. *Foster,* 87 Tenn. 4, 9 S. W. 195. In the following cases the statute declares the agreement invalid "unless the same or some note or memorandum thereof be in writing and subscribed by the party charged, or by his agent. Evidence, therefore, of the agreement cannot be received without the writing or secondary evidence of its contents: * * * (4) An agreement for the sale of goods, chattels, or things in action, at a price not less than two hundred dollars, unless

the buyer accept and receive part of such goods and chattels, or the evidences, or some of them, of such things in action, or pay at the time some part of the purchase money." Code Civ. Proc. (Comp. Laws Utah 1888) § 3918. As we have seen, the paper relied upon as a written memorandum of the oral agreement between the appellant Fugate and defendant Walker did not embrace the agreement of the former to keep his offer to sell his option open a reasonable time, or the latter's agreement to do the development work on the mining claim without delay. For these reasons the paper signed by Fugate cannot be held a memorandum of the oral agreement made by him and the defendant Walker on November 5, 1896.

Leaving the memorandum out of view, the question arises, does the evidence in the record establish a binding contract between Fugate and Walker? Before the latter was willing to accept or refuse Fugate's offer, he wished to know more about the mining claim; and, for his own information, he commenced development work on November 6, 1896, and prosecuted his investigations until the 13th day of the same month, when he became satisfied, and late in the evening of that day he notified Fugate that he had elected to accept his offer, and stated to him that he would on the morning of the next day, as soon as the bank opened, make payment to the bank as the terms of his option required, and requested Fugate to be present. While Fugate and Walker disagree as to the conversation at the time notice of the election was given, it sufficiently appears that the former wished the latter to postpone complying with his option a few days, for fear he would have trouble with Gillespie and Holmes, two of the owners of the stock deposited with Walker Bros. He did not repudiate his agreement with defendant Walker, or notify Walker Bros. not to accept payment. He recognized the agreement with him as binding, but wanted the execution of it postponed a few days. On the morning of the next day

after the election to accept Fugate's offer, Walker appeared at the bank (which means Walker Bros.), and paid to Farnsworth, its cashier, the amounts due the respective owners, according to the terms of their option to Fugate, and the same were credited by the bank to their accounts, respectively, aggregating $6,544.45, and he also paid the $150 to the bank to be credited to Fugate's account; and the stock was delivered to Walker in pursuance of the options, and the parties to whom the credits were made were notified of the credits to their respective accounts; and two of the owners of the stock checked their credits out the same day, and three two days after that, and Fugate by December 1st of the same year had checked his $150, and the remaining owner afterwards checked his out; and Walker also notified Fugate that he held the 24,700 shares of stock subject to his order. While the acceptance of Fugate's offer, simply, without a written agreement or memorandum, or further execution of the verbal agreement by the defendant Walker, or the payment of any part of the consideration, would have amounted to an oral agreement within the statute of frauds, we are of the opinion that the expenditure for the development work by him, made with the knowledge and consent of Fugate, and the payment to the bank of the sums due the respective owners of the stock, and their acceptance thereof, amounted to such payment for the option to Fugate, as took the transaction out of the statute of frauds. In fact, those payments, and the payment of the $150 due Fugate, and the notice to him that the 24,700 shares were subject to his order, and the delivery of the 179,300 shares to Walker thereafter, amounted to a complete execution of the agreement between him and Fugate, as well as the contract between him and the owners of the stock.

Appellant Bamberger also makes a claim to one-half of the stock in dispute, and insists that his right to it is superior to that of J. R. Walker, Jr. It appears that on the morning

after the verbal option was made to him, on November 5, 1896, Walker told Farnsworth, an officer of Walker Bros.' Bank, who had charge of the stock and the agreement under which it was deposited, that he had taken the option from Fugate; and at 1 o'clock in the afternoon he deposited the same with Farnsworth, and asked him to note the time on the envelope. It further appears that about an hour afterwards Fugate handed Farnsworth a sealed envelope, on which was written:

"Walker Bros., City—Gentlemen: This envelope contains a letter in relation to an escrow for 179,300 shares of the Omaha stock in your hands, dated October 26, 1896; and, before delivering the same to any person, please open this, and consider it in connection with the escrow above named. Yours truly, W. S. Fugate."

It appears the envelope was not opened until Walker had done the development work, and had accepted Fugate's offer, and paid to the bank the amounts due the respective owners of the stock, and until he had complied with the terms of his option, and the stock had been delivered to him. When the envelope was opened, it was found to contain the following notice:

"Walker Bros., Salt Lake City—Gentlemen: In reference to the escrow made to me on October 26, 1896, for the purchase of Omaha stock, please take notice that I have sold and conveyed a one-half interest in said escrow to Simon Bamberger. W. S. Fugate."

We must assume from the evidence in the record, that Mr. Bamberger knew of the terms of the option to Fugate, and of his option to Walker, and that the latter was doing development work on the mining claim. If he wished to notify Walker Bros. and J. R. Walker, Jr., of his interest in the stock, Bamberger should have done so plainly. He should not have sealed up Fugate's notice, and have simply directed the seal to be broken before delivery of the stock; for it

appears it was done by Bamberger, or by his direction. We must hold that the work upon the mining claim by Walker, as the terms of his option required, and his payments when he gave notice to Fugate of his acceptance, or within less than a day thereafter, made a valid contract, notwithstanding the statute of frauds, and that it attached to the stock before the notice of defendant Bamberger's claim was made known to Walker Bros. or to him. After the delivery of the stock to Walker,—Fugate and Bamberger on the 17th day of the same month, tendered Walker Bros. the amount J. R. Walker, Jr., had paid on it, and demanded a delivery of it to them. This tender and demand Walker Bros. refused, but in order to be relieved from litigating the adverse rights of Fugate and Bamberger and J. R. Walker, Jr., they requested a return of the stock to them; and, to accomplish that end, Walker consented, without intending further to relinquish any of his rights to the stock. In this we hold that defendant Walker lost none of the rights which he obtained by the acceptance of Fugate's offer, and the execution of the terms of his option.

It is also urged that the court below erred in granting the decree requiring the defendants to interplead and litigate their conflicting claims between themselves. It appears from the allegations of the complaint and the evidence that Walker Bros. had no interest in the stock, further than to deliver it to the person or persons found to be entitled to it; and the defendants having made conflicting claims to it, and no collusion appearing, it was a proper case for such a decree.

The defendants Bamberger and Fugate also assign as error the order of the court granting the defendant J. R. Walker leave to file his amended cross complaint after the evidence had been heard. The amendment was permitted, to make the complaint conform to the proofs. The undertaking of Walker to do the development work on the mining claim without delay, and the return of the stock by J. R. Walker, Jr.,

to Walker Bros., after the delivery to him on November 14th, are shown by the proof, and that he did not intend thereby to surrender any of his rights by virtue of the execution of the requirements of his option were first alleged in the amended complaint. Courts of equity grant such amendments to enable causes to be decided upon the proofs, when all the parties have been permitted to introduce their evidence on the new issues presented by the amendments, and when the court can see that no injustice could result. In view of the fact that both sides rely upon the validity of the option given by the owners of the stock in dispute to Fugate, and its binding effect not being disputed, we are disposed to hold that he was authorized to make a valid transfer of it, in equity, to defendant Walker.

Other errors are assigned by cross complainants Fugate and Bamberger, which we have considered, but we do not deem it necessary to prolong this opinion by a discussion of them. We find no reversible error in the record.

The decree of the court below is affirmed, with the following changes: J. R. Walker, Jr., shall hold for and deliver to defendant Simon Bamberger the 24,700 shares of stock decreed to Fugate in the decree appealed from. This change is made in the decree in view of the sale by Fugate of one-half of the stock in dispute to Bamberger before the institution of this suit, as it appears from the record. The case is remanded, with directions to the court below to make a change in its decree as above stated.

Judgment for costs of appeal to plaintiff and J. R. Walker, Jr., against Fugate and Bamberger.

BARTCH and MINER, JJ., concur.

BOSTON & MONTANA CONSOLIDATED COPPER & SILVER MINING CO. v. MONTANA ORE PURCHASING CO.

(89 Federal 529. U. S. Circuit Court, District of Montana. July 23, 1898.)

Stockholders' consent to corporate deed. The fact that the consent of the holders of two-thirds of the stock of a corporation was not obtained to the execution of a deed by the corporation, as required by Mont. Civ. Code, Secs. 1012, 1013, does not render the deed void, and it cannot be attacked on that ground by a stranger to the title.

[1]**Apex rights of grantee of part of lode.** The grantee of parcel of a mining claim by metes and bounds has the same right to follow the vein on the dip and to the same extent as his grantor had to so much of the vein as has its apex within the parcel conveyed. The divisional line protracted and treated as having the office of the end line in a patent.

This is a suit for an injunction. Heard on applicaton for a temporary injunction.

JOHN F. FORBIS, for complainant.

JOHN J. MCHATTON, for defendant.

DE HAVEN, District Judge. The action is one to enjoin the defendant from extracting ore from certain veins having their apexes within the premises described in the bill of

[1]*Richmond Co.* v. *Eureka Co.* cited in the text is printed in 9 M. R. 634. The *Eureka case*, 9 M. R. 578. The *Stinchfield case*, 18 M. R. 195. None of these cases create or allow of diverging end lines as the text case does. In *Argonaut Co.* v. *Kennedy Co.* 131 Cal. 15; 21 M. R. —, deciding on the right of 1866 patents to follow the dip such apex right was given at right angles to the strike of the vein.

The text case is disapproved in *Montana Co.* v. *Boston Co.* 27 Mont. 288; 22 M. R. —.

Where the apex leaves one side line all the cases make a new end line at such point parallel to the end line out of which the lode goes. *Del Monte Co.* v. *Last Chance Co.* 19 M. R. 370. *Tyler Co.* v. *Last Chance Co.* 18 M. R. 303.

complaint, and the questions arising upon the present application of plaintiff for an injunction pendente lite may be very briefly disposed of.

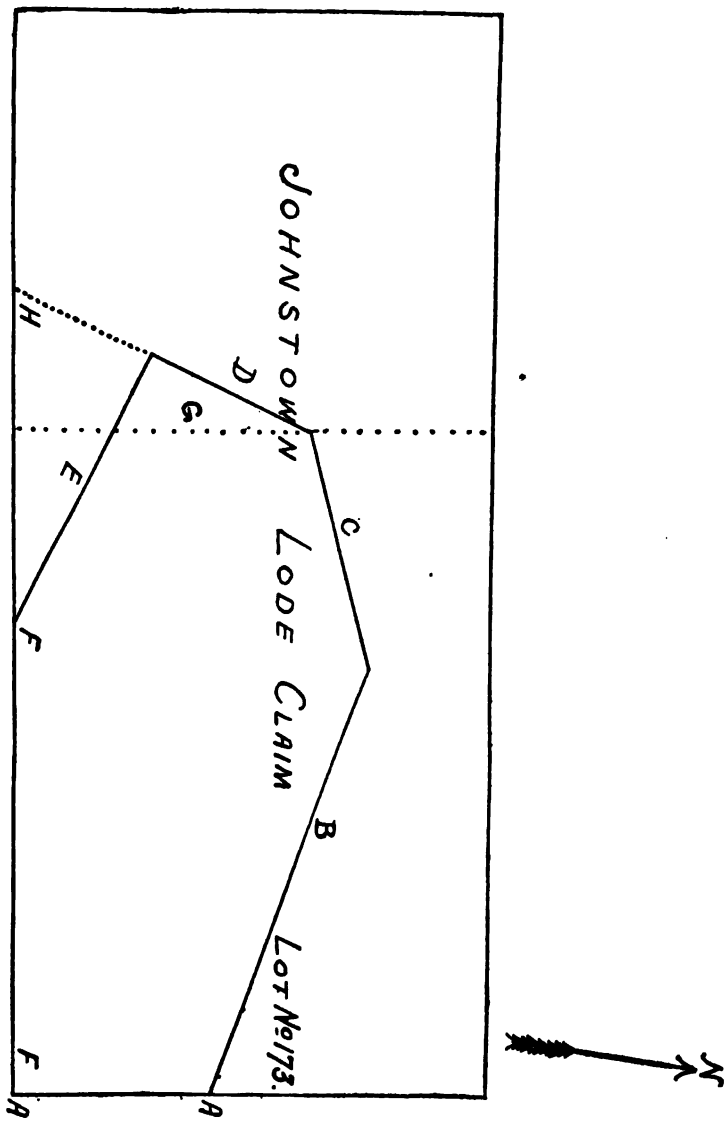
1. The deed executed on April 6, 1898, by the Boston & Montana Consolidated Copper & Silver Mining Company of Montana to the complainant conveyed to it the legal title to the premises therein described, notwithstanding the fact that such deed was not executed with the consent of the holders of two-thirds of the shares of the capital stock of the grantor company, as required by sections 1012 and 1013 of the Civil Code of Montana. The deed is not void, but only voidable, and the defendant, who is a stranger to the original title of the corporation grantor, is not in a position to take advantage of the fact that it was not executed in the manner provided by these sections of the Civil Code. *Campbell* v. *Mining Co.,* 51 Fed. 1. See, also, *Hervey* v. *Railway Co.,* 28 Fed. 169; *Beecher* v. *Mill Co.,* 45 Mich. 103, 7 N. W. 695. The argument of counsel for the defendant that the deed referred to is absolutely void finds support in the cases of *Pekin Co.* v. *Kennedy,* 81 Cal. 356, 22 Pac. 679; *McShane* v. *Carter,* 80 Cal. 310, 22 Pac. 178; but, in my opinion, the rule laid down in *Campbell* v. *Mining Co.,* 51 Fed. 1, and in the other cases above cited, for the construction of statutes like the sections of the Civil Code of Montana above referred to, is the one best supported by reason, and is in harmony with the great weight of authority.

2. The controversy between the parties hereto relates in part to the right to extract ore from lodes or veins belonging to what was originally the Johnstown lode claim. Each of the parties is the owner of a portion of the Johnstown lode claim, and their respective titles are derived from a common source. The title of the defendant originates in a deed executed to it on March 7, 1883, conveying all the right, title, and interest of the grantors—

"To that certain portion, claim, and mining right, title, and property, on that certain ledge, vein, lode, or deposit of quartz and other rock in place, containing precious metals of gold, silver, and other metals, and situated in the Summit Valley Mining District, county of Silver Bow, and territory of Montana, and described as follows, to wit: Beginning at the S. E. cor. of lot 173, a granite stone 26x 12x6 ins., 20 ins. deep, with mound of stone, 2½ feet high, 4½ feet base, alongside the stone, and running thence N., 8 degrees 30 minutes west, 219 feet.; thence N., 70 degrees 09′ W., 522 ft., from which cor. No. 1 of lot No. 179 bears N., 70 degrees 09′ W., 550 ft. distant; thence S., 74 degrees 33′ W., 329 ft.; thence S., 25 degrees 40′ W., 235 ft.; thence S., 69 degrees 25′ E., 400 ft.; thence N., 85 degrees 30′ E., 567 ft., to the place of beginning,—containing an area of 6 86-100 acres: All right, title, and interest that is now possessed, together with any that may hereafter accrue, through application No. 1,265 made to the U. S. government by the grantors herein for a patent for lot No. 173; together with all the dips, spurs, and angles, and also all the metals, ores, gold, silver, and metal-bearing quartz, rock, and earth therein, and all the rights, privileges, and franchises thereto incident, appendent, and appurtenant, or therewith usually had and enjoyed."

The remaining portion of the Johnstown lode claim is owned by the complainant, and the following diagram will show the surface lines bounding the respective tracts owned by the parties hereto. (P. 483.)

The parallelogram shown upon the diagram represents the Johnstown lode claim as patented by the United States, and the portion thereof conveyed to the defendant by the deed above referred to is bounded by the lines, AA, B, C, D, E, and FF. The complainant seeks to enjoin the defendant from extracting ores from that portion of the veins belonging to the original Johnstown lode claim lying beneath and inside of the surface lines of the triangular piece of ground indicated upon the diagram by line, H. F., the dotted line, G, and line, D, extended, as shown by dotted line marked on the diagram. The claim of the complainant is that the ores lying beneath the surface lines last mentioned did not pass to the defendant under the above referred to conveyance of March 7, 1883; the complainant contending that, under a


JOHNSTOWN
LODE CLAIM
LOT No 173.
H
D
G
E
C
F
B
F
A
A
N

proper construction of that deed, the west end line of the property thereby conveyed to the defendant is to be run parallel with the end lines of the Johnstown lode claim, in the direction shown by the dotted line, G. This contention cannot be sustained. The line, D, is the division line between the parties, constitutes the west end line of that portion of the mining claim owned by the defendant, and the defendant is entitled to all ores lying within the surface lines of its deed, found in veins apexing in the original Johnstown lode claim, and has the right to follow such veins on their dip beyond the south lateral line (FF and E) of the premises conveyed to it until such veins in their dip reach line D, this line being the west end line of the premises described in defendant's deed of March 7, 1883, or until such veins in their dip reach the projection of such line in its own direction, as shown by the dotted line in the diagram. In my judgment, the defendant has the same right to follow veins upon which it commences to work within its surface lines as was possessed by the patentees of the Johnstown lode claim before making their conveyance to the defendant. Support to this conclusion will be found in the cases of *Richmond M. Co.* v. *Eureka M. Co.,* 103 U. S. 839; *Eureka Con. M. Co.* v. *Richmond M. Co.,* 8 Fed. Cas. 819, 4 Sawy. 302; *Stinchfield* v. *Gillis,* 107 Cal. 86, 40 Pac. 98.

It follows that the application for an injunction pendente lite must be denied, except as to that part of the premises described in the bill lying north and east of the premises described in defendant's deed above referred to.

S. HAYES ET AL. v. GIOVANNI LAVAGNINO.

(17 Utah 185; 53 Pac. 1029. Supreme Court. July 26, 1898.)

Where findings of fact are amended by the court while a motion for a new trial of the cause is pending, and the amendments are responsive to issues presented by the pleadings, and are supported by, and fair deductions from, the evidence, the action of the court in making the amendments will be regarded as authorized and justified.

Proof of the vein and its discovery. In a suit to determine the right of possession of a mining claim, it is incumbent upon the locator to show, not only a location upon ground in due form of law, but also to show that the location was made upon a vein or lode of quartz or other rock in place, bearing mineral, with the discovery or knowledge on the part of the locator, before the location was made, of the existence of mineral there.

[1]**Need not be first discoverer.** Under section 2320, Rev. St. U. S., the locator of a mining claim is not required to be the original discoverer of the vein or lode. If, at the time of making the location, there is the discovery of a vein or lode of quartz or other rock in place, and knowledge on the part of the locator of mineral there, the locator is entitled to make his location, even though the discovery was first made by some one other than the locator.

[2]**Vein in zone.** In practical mining, the terms "vein" and "lode" apply to all deposits of mineralized matter within any zone or belt of mineralized rock separated from the neighboring rock by well-defined boundaries, and the discoverer of such a deposit may locate it as a vein or lode. In this sense these terms were employed in the several acts of congress relating to mining locations.

Any valuable deposit. Under the acts of congress of July 26, 1866, and May 10, 1872, any deposit of mineral matter, or indication of a vein or lode, found in a mineralized zone or belt, within defined boundaries, which a person is willing to spend his time and money to follow, in expectation of finding ore, is the subject of a valid location; and, when metallic vein matter appears at the surface, a valid location of a ledge deep in the ground, to which such vein matter leads, may be made.

Statute of limitations. A party who wishes to rely upon the statute of limitations in a suit to determine the right of possession of a mining claim must plead it.

(Syllabus by the Court.)

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[1]*Book* v. *Justice Co.* 17 M. R. 617.

[2]*Doe* v. *Waterloo Co.* 18 M. R. 265. *Waterloo Co.* v. *Doe*, 19 M. R. 1. *Shoshone Co.* v. *Rutter*, 19 M. R. 356.

Appeal from District Court, Salt Lake County; Ogden Hiles, Judge.

Action by S. Hayes and another against Giovanni Lavagnino. Judgment for defendant, and plaintiffs appeal. Reversed.

FRANK HOFFMAN, for appellants.

S. H. LEWIS, for respondent.

BARTCH, J. This is an action to determine the adverse claims of the parties to the right of possession of certain mining ground situate in West Mountain mining district, Salt Lake county, state of Utah. It is alleged in the complaint, in substance, that prior to January 1, 1893, the plaintiffs were, ever since have been, and now are, the owners (subject to the paramount title of the United States) in possession, and entitled to the possession, of the Gladstone mining claim, containing a lode of rock in place, bearing silver and other precious metals, situate in West Mountain mining district (the claim being particularly described in the complaint by metes and bounds); that the defendant, who claims to be the owner of the Montreal No. 1 mining claim, about November 10, 1895, wrongfully caused the same to be so surveyed as to overlap the Gladstone, and include a portion thereof (the portion included being also described by metes and bounds); that about July 3, 1896, the defendant made application for a patent for the Montreal No. 1 mining claim, as so surveyed, in the United States land office at Salt Lake City, and caused the register to give notice of the application as required by law; that in the application for patent the defendant wrongfully alleged that he was the owner and in possession of the whole of the Montreal No. 1 claim, including that portion of the Gladstone claim so wrongfully

surveyed and overlapped; that the plaintiff within the proper time filed a protest and adverse claim in the land office for that portion of the Gladstone included in the Montreal No. 1 claim; that thereupon the proceedings on the application in the land office were stayed to await the determination by a court of competent jurisdiction of the right of possession of the disputed ground; and that, to determine the rights of the respective parties thereto, this suit was brought. After denying the allegations of the complaint in his answer, the defendant alleges ownership and right of possession to the disputed ground in himself, and avers that he located the Montreal No. 1 mining claim, according to law, about June 1, 1896, and fully performed the assessment work, and that the area in conflict is a part of the Montreal No. 1 claim. At the trial the court rendered judgment in favor of the defendant, and thereupon the plaintiffs appealed.

Counsel for the appellants insist that the court erred in rendering judgment in favor of the defendant, for the reason, among others, that under the additional facts found by the court the plaintiffs were entitled to judgment for the ground in controversy. The findings of fact, conclusions of law, and decree were filed May 13, 1897. The "additional findings of fact" were allowed and filed on June 21, 1897; and counsel for the respondent maintains that the court had no authority to make and file them after the findings of fact had been filed, and the decree entered. The additional findings, however, are responsive to issues presented in the pleadings, and were made and filed while a motion for a new trial was pending, and before final action on that motion. They appear to be supported by the evidence, and are fair deductions therefrom. Under these circumstances, we are of the opinion that the court was authorized and justified in amending the findings of fact by making the additional findings. Did, then, these findings entitle the appellants to judgment for the ground in controversy?

An affirmative answer to this question does not necessarily follow from the character of the findings, which read: "That on the —— day of January, 1882, said P. Phelan, who was then and there a citizen of the United States, posted a notice of location on a point on the Gladstone mining claim, marked, on the map used herein, 'Discovery,' and caused the same to be duly recorded in the mining recorder's office of the West Mountain mining district, Salt Lake county, Utah territory; that said location notice contained a sufficient description of the ground attempted to be located, with reference to natural objects and permanent monuments, as to sufficiently describe the same; that the description contained in said location notice is the same as that contained in plaintiff's complaint, and in plaintiff's protest on file in the United States land office. Second. That during each and every year after the posting and recording of said location notice the plaintiffs in this action did and performed more than $100 worth of work and improvements on the ground described in said location notice. Third. I find that there was sufficient marking of the claim on the ground, by posts and monuments, as to identify the same." These findings show that on January 1, 1882, a notice of location was posted on the Gladstone claim at a point designated as "Discovery"; that the notice was duly recorded, and contained a sufficient description of the claim, respecting natural objects and permanent monuments; that such description is the same as that contained in the complaint herein, and protest filed in the land office; that during each year since 1882 more than $100 worth of work was performed in improvements on the claim; and that the claim was sufficiently marked on the ground, by posts and monuments, to identify it. They do not show, however, as will be observed, that the location was made upon a vein or lode of quartz or other rock in place, bearing gold, silver, or other valuable deposit of mineral, in accordance with the laws of the United States; and therefore these

findings, of themselves, do not entitle the appellants to judgment. It is incumbent upon them to show, in addition to what was so found, the existence of mineral at the point of their discovery, or in its immediate vicinity; that is, that the location was made upon a vein or lode of quartz or other rock in place, bearing mineral, with the discovery or knowledge on the part of the locators, before the location was made, of the existence of mineral there. On the question of such discovery and knowledge respecting the existence of mineral, the court found as follows: "That the plaintiffs, or either of them, or their grantors, never at any time located the alleged Gladstone mining claim, for that they did not discover, nor had any one before the alleged location of this claim discovered, any vein or lode or rock in place, bearing minerals, within the limits of the claim located,"—and, in deciding the case, held that the evidence did not show an actual location of the premises by plaintiffs or their grantors or predecessors in interest. To determine whether the court erred in this finding and decision, as is maintained by the appellants, it becomes necessary to refer to the evidence respecting the nature of the material on which the location was made, and the discovery or knowledge on the part of the locators of the existence of metal at, or in the immediate locality of, the location.

It appears the ground constituting the Gladstone claim was first located in 1878, and work done in sinking the discovery shaft. Thereafter it was several times relocated, under different names, until in January, 1882, when it was located as the Gladstone claim. The parcel of ground thus located extends in a northeasterly and southwesterly direction; being bounded on the northeast by the Revere claim, and on the southwest by the Montreal. Referring to the history of the claim, counsel for the respondent, in his brief, said: "This fraction of ground now called the 'Gladstone' was first located in 1878. The shaft now used by the appel-

lants for a discovery was then used as a discovery shaft by the then locators." It is thus conceded that the discovery shaft was sunk before 1882, and therefore whatever mineral strata or vein may be shown to exist there must have been discovered before the location of the Gladstone; and it is but just and reasonable, under the circumstances of this case, to infer that, if a mineralized vein or lode was discovered by the sinking of that shaft, its existence was known to the locators of the Gladstone before the location was made. If a vein or lode actually exists at the point of their discovery, then such discovery would seem to be a substantial compliance with the provisions of section 2320, Rev. St. U. S., which reads, "No location of a mining-claim shall be made until the discovery of the vein or lode within the limits of the claim located." This clause of the statute does not require that the locator of the claim must be the original discoverer of the vein or lode. If, then, in this case there was a discovery of a vein, and knowledge on the part of the locators of metal there, the locators were entitled to make their location, even though the original discovery was made by some one other than the locators. *Jupiter M. Co.* v. *Bodie M. Co.*, 7 Sawy. 96, 11 Fed. 666; *Erhardt* v. *Boaro*, 113 U. S. 527, 5 Sup. Ct. 560. Does, then, the evidence show the existence of a vein or lode, within the meaning of the statute? On this point the witness Gibbons, who has known that ground since 1880, testified: "I know what was shown me as the discovery of the Gladstone. I examined it with a view of determining whether or not there is a cropping of the vein there. There are indications of a vein there. There is a shaft down there, and some water in the bottom of it. The surface indications on the other side of the shaft are mineralized. Q. Were they such indications that a miner would follow in that district, expecting to find a vein? A. Yes, sir. Q. Did you ever see any ore taken from there, or any rock taken from the surface? A. Yes, sir. Q. Is that

the character of the rock, or the outcropping on the surface, where this discovery was shown to be made? A. Yes, sir. Q. Would that indicate a mineral vein in that locality? A. Yes, sir; it would to me. Q. Is it such an outcropping or croppings that a miner would follow? A. Yes, sir; in my experience. Q. They lay on the surface, above the shaft? A. Yes, sir. Q. What was the nature and character of the ground upon which that shaft was sunk, as far as you could see it? A. Well, judging from looking at it, it would be oxidized like black rock. It would be quartzite. I didn't examine it very closely. It would be quartzite." The witness Legg, who was shown to be a mining superintendent of large experience, testified that he was acquainted with the Gladstone claim; that he had done work for the Lead Mining Company, of which he was superintendent, "upon the Revere, joined with the Gladstone interests, first under a joint lease,—the Revere holding a lease with the Gladstone in 1893"; and on cross-examination the witness said: "The tunnel that is spoken of in regard to developing the Gladstone was started in 1883. I followed what I presume was a vein. I called it that. Went down in the shaft 90 feet. Went down on the material that is within the walls. The vein was first 100 to 200 feet wide. Q. Where did you find that? A. Well, we found it anywhere along here—along the strike of the vein—for a distance of several thousand feet. During the period that I worked, I run the crosscut towards the hanging wall of the vein, and I think back, to make the connection with the works below. The total distance from the drifts was possibly 100 feet. When I made the connections, I went down to the lower workings. All this work below showed the apex on the Gladstone and on the Revere. The apex passes out of the end line of the Rvere, and into the Gladstone. Q. Do you know what place it passes out? A. Well, I presume that it would follow—taking it on the slope of the hill—that it would follow the

entire distance. Q. How is that? A. Taking the width of the vein, it would possibly follow the entire distance between the side lines of the Revere. I don't know. It was never exactly defined on the surface on the wall. I have examined that closely, to some extent. This country here covers the apex,—the whole entire width of the claim; covers the apex of the vein. You must remember that the vein is very wide,—say, 150 feet. I haven't found it 250 feet wide. Coming down to nearly exact figures, I think the widest I have found it is 130 feet. The greater portion of the vein lies within the Revere ground, and passes into the Gladstone. There is no probability that the vein can pass or fall below the lower side line; that is, the easterly side line of the Revere. I have been over this ground a thousand times, I presume, and over the surface of the Gladstone. There is a vein passing through the point at the discovery of the Gladstone, that is a seam mineralized, that goes on and leads on down into the ore bodies below. It is what would be termed a 'vein.' It is one of the stringers or leaders from the vein. There is no porphyry dyke. There is overflow porphyry. There may be possibly overflown porphyry at the discovery. I didn't say it was a dyke. I said it was a feeder. It is mineralized strata. By the Court: What do you call a 'feeder'? The feeder running in the Gladstone? A. Into the ore that lies below the surface a small seam runs. You take the larger ore bodies below, and there are smaller seams of ore running over it to the vein matter. They are generally termed 'feeders.' Q. Where are these feeders,—in what claims? A. Well, you will find them in the Gladstone; also, in the Revere." There is other evidence of the plaintiffs tending to show metalliferous rock and matter within the limits of the Gladstone; and this evidence does not appear to be disputed by the defendant, except in a general way, by attempting to show that the sur-

face of the Gladstone claim is covered with porphyry, and that the porphyry generally contains no ore.

Looking at the above, and other evidence in the record of like import, from a strictly scientific view it probably would not show the existence of a vein or lode within the limits of the claim. Geologists, when accurately speaking, apply the terms "vein" and "lode" to a fissure in the earth's crust filled with mineral matter. In Von Cotta's treatise on Ore Deposits (Prime's Translation, § 16), the author says: "Veins are aggregations of mineral matter in fissures of rocks. Lodes are therefore aggregations of mineral matter containing ores in fissures." Similar definitions have been given by Dana, Steele, and others. It will thus be noticed that, in the judgment of a geologist, a fissure or fracture in the earth's crust seems to be an essential element in the definition of either of these terms. If, therefore, the validity of a mining location, when assailed, were to be tested strictly by these definitions, it would doubtless be incumbent upon the locator to show that the location was made upon a fissure with well-defined walls on each side, and filled with metalliferous matter. That many mining claims, the locations of which have never been questioned, could not withstand such a test, cannot be doubted. The practical miner has paid little attention to scientific definitions of these terms. As to the term "lode," it has been said that the miners made the first definition, and that as used by them, before defined by any authority, it simply meant whatever they could follow, expecting to find ore,—that formation by which a miner could be led or guided. This is implied by its derivation; the term being a variation of the verb "lead." The word "vein," with the miner, means practically the same thing. By him the two terms are used, interchangeably or together, to mean some formation within which, or following which, he can find ore, and outside of which he can-

not expect to find it. The fissure, therefore, and its walls, are of importance, in the business of mining, only as defining the boundaries within which miners may reasonably expect to find ore. Doubtless, in practical mining the terms "vein" and "lode" apply to all deposits of mineralized matter within any zone or belt of mineralized rock separated from the neighboring rock by well-defined boundaries, and the discoverer of such a deposit may locate it as a vein or lode. We apprehend that the several acts of congress relating to mining locations were enacted for the protection of the miners, and that the terms "vein" and "lode" were employed in the sense in which they had used them, uncontrolled by scientific definitions. The act of July 26, 1866, provided for the procuring of a patent by any person or association of persons claiming a "vein or lode of quartz, or other rock in place, bearing gold, silver, cinnabar, or copper." The act of May 10, 1872, speaks of "veins or lodes of quartz or other rock in place, bearing gold, silver, cinnabar, lead, tin, copper," and other valuable deposits. No definitions of the terms "vein" and "lode" are given in either of the acts, and from the fact that cinnabar and lead ores are included, it would seem that it was not the intention of the framers of the acts that purely scientific definitions should be applied in giving them effect; for it is not a characteristic of cinnabar that it is found in fissures of the earth's crust, or in veins or lodes as defined by geologists. It occurs generally in fibrous or amorphous masses bedded in shales or slate rock. So lead is frequently found between strata in flat cavities, in beds within sandstones and rudimentary limestones,—formations which would not answer to veins or lodes, when speaking with scientific accuracy. A definition of "vein" or "lode" which would exclude any one of the metals mentioned would, with reference to those enactments, be defective; and its application, in interpretation, would not be in harmony with the spirit and intent manifest from con-

texts. Evidently those laws were not enacted in the interests of science, but for the purpose of protecting the rights of miners as to their mining claims located and developed and therefore should be construed with such liberality as to effectuate that purpose, and protect miners as to their mining claims located upon any kind of vein or lode of quartz or other rock in place, bearing any of the metals named in the acts, regardless of the kind or character of rock or formation in which the mineral may have been found. The fact that the terms "vein" and "lode" have been used, by the legislators in connection with each other is suggestive that congress intended to avoid any limitation in the application of the acts which might be imposed by a scientific definition of either term. Mr. Justice Field, in the *Eureka Case,* 4 Sawy. 302, Fed. Cas. No. 4,548, after discussing the term "lode" as used in scientific works and in the acts of congress, said: "It is difficult to give any definition of the term, as understood and used in the acts of congress, which will not be subject to criticism. A fissure in the earth's crust, an opening in its rocks and strata made by some force of nature in which the mineral is deposited, would seem to be essential to the definition of a 'lode,' in the judgment of geologists. But to the practical miner the fissure and its walls are only of importance as indicating the boundaries within which he may look for, and reasonably expect to find, the ore he seeks. A continuous body of mineralized rock lying within any other well-defined boundaries on the earth's surface, and under it, would equally constitute, in his eyes, a lode. We are of opinion, therefore, that the term, as used in the acts of congress, is applicable to any zone or belt of mineralized rock lying within boundaries clearly separating it from the neighboring rock." It would seem, from these considerations, that any deposit of mineral matter, or indication of a vein or lode, found in a mineralized zone or belt within defined boundaries, which a person is willing to

spend his time and money to follow in expectation of finding ore, is the subject of a valid location, and that, when metallic vein matter appears at the surface a valid location of a ledge deep in the ground, to which such vein matter leads, may be made. 1 Lindl. Mines, § 336; *Mining Co.* v. *Cheesman,* 116 U. S. 529, 6 Sup. Ct. 481; *Harrington* v. *Chambers,* 3 Utah 94, 1 Pac. 362; *Railway Co.* v. *Migeon,* 68 Fed. 811; *Burke* v. *McDonald* (Idaho) 29 Pac. 98; *Book* v. *Mining Co.* 58 Fed. 106; *Stevens* v. *Williams,* 1 McCrary, 480, Fed. Cas. No. 13,413; *Shreve* v. *Mining Co.,* 11 Mont. 309, 28 Pac. 315; *Chambers* v. *Harrington,* 4 Sup. Ct. 428; *Larkin* v. *Upton,* 144 U. S. 19, 12 Sup. Ct. 614. Looking at this case in the light of authority and of the principles discussed, we are unable to say that the finding in question and the decision of the court are warranted by the evidence.

As a new trial must be granted, it may be important to suggest that there is considerable evidence in the record which is indefinite, uncertain, and unintelligible; there being numerous mining claims contiguous to the Gladstone, as shown by the map, marked "Defendant's Exhibit 3" and the witnesses, in many of their statements, having used the words "here" and "there" without designating the claim to which they referred. Such statements can be of no value in this court, and ought not to be permitted.

Counsel for the appellants, in his brief, also maintains that they were in possession of the Gladstone claim for a period longer than that of the statute of limitations, and for that reason were entitled to judgment against the respondent. In answer to this contention, it is sufficient to say that no such issue was raised in the pleadings.

A discussion of the other points raised in the record is not deemed important. The case is reversed, and the cause remanded, with directions to the court below to grant a new trial.

ZANE, C. J. and MINER, J., concur.

[1]HENRY LOCKHART v. J. Q. WILLS ET AL.

(9 New Mexico 344; 54 Pac. 336. Supreme Court. August 23, 1898.)

[2]**Certain Spanish grants open to prospectors.** Lands embraced within the boundaries of a Mexican or Spanish grant in New Mexico in 1893, as claimed, and which were sub judice in the court of private land claims, were open to exploration and purchase under the mining laws of the United States.

Location not perfected. (a) As against a subsequent locator, a location, not perfected according to the territorial laws within the time provided, becomes forfeited and void, and the ground embraced therein becomes open to location.

(b) Plaintiff, to maintain ejectment against a subsequent locator, must show a valid location.

(c) When the facts produced by plaintiff show a forfeiture of his location has taken place, it is the duty of the court to instruct the jury to find for the defendants.

Conspiracy, when immaterial. Where facts show that a forfeiture of plaintiff's location has taken place for failure to perform the statutory requirements for a valid location, it is immaterial to show that such failure was a result of a conspiracy to defraud plaintiff on the part of plaintiff's co-locator, with other persons who locate after forfeiture.

(a) **The assigning of a wrong reason** for an act by the trial court is not reversible error if the act done was, in law, right.

(b) When the plaintiff's case is inherently and fatally defective, and is incurable, the defendant is entitled to have the judgment affirmed, notwithstanding error of the trial court.

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[1]*Affirmed* 181 U. S. 516, *subnomine Lockhart* v. *Johnson.*

[2]Confirmation of Mexican grant in the absence of fraud, conclusive against the U. S. *U. S.* v. *San Jacinto Tin Co.* 23 Fed 279.

In *Gildersleeve* v. *New Mexico Co.* a confirmed Mexican grant was upheld on the ground of complainants laches. 161 U. S. 573.

Until reported by surveyor general to congress and waiting congressional action, cannot be contested in court. *Astiazaran* v. *Santa Rita Co.* 148 U. S. 80.

The government is not liable as defendant in the court of Private Land Claims to make good a grant. Its action approving the grant is not like a patent, which is an original conveyance. *Real, etc.* v. *U. S.* 175 U. S. 71.

Facts held sufficient to justify cancellation of patent confirming Mexican grant. *U. S.* v. *San Pedro Co.* 4 N. Mex. 225; 17 Pac. 337.

Intervention of hostile location. (a) When plaintiff allows his location to become forfeited by failure to perfect same, as required by law, he cannot set up as an excuse for failure that prior to the expiration of the time allowed by law to perfect his location others took adverse possession of his claim, of which he was not aware until after forfeiture.

(b) In order for adverse possession and ouster to furnish an excuse for not perfecting the location of a mining claim, the party offering such excuse must have in some way been prevented thereby from perfecting his location. Lockhart v. Wills, 50 Pac. 318, overruled. (Syllabus by the Court.)

Error to District Court, Bernalillo County; before Justice N. C. Collier.

Action by Henry Lockhart against J. Q. Wills and others. Judgment for defendants. Plaintiff brings error. Affirmed.

WARREN, FURGUSSON & GILLETTE, for plaintiff in error.

CHILDERS & DOBSON, for defendants in error.

PARKER, J. This is an action of ejectment, brought by the plaintiff in error against the defendants in error in the district court of the second judicial district, sitting in and for Bernalillo county, for the recovery of the possession of

The confirmation of the grant does not pass title to the mineral lands within the grant. *Id.*

The courts have no jurisdiction to determine the validity and extent of an unconfirmed Mexican grant. There is a special tribunal for the adjudication of these titles. *Astiazaran* v. *Santa Rita Co.* (Ariz.) 20 Pac. 189.

Where a grant has been segregated and turned over to the grantees and so reported to congress, title passes without patent. And a reservation in the approval by the surveyor general excluding or leaving open the question of mineral rights, is void. *Shaw* v. *Kellogg*, 170 U. S. 312.

Court cannot revise the action of congress in confirming the grant. *Catron* v. *Laughlin*, (N. Mex.) 72 Pac. 26.

a piece or parcel of mining ground called by the plaintiff in error the "Sampson Mining Claim," situated in the Cochiti mining district, in said county.

At the close of the trial the court instructed the jury to find a verdict in favor of the defendants, and entered judgment accordingly. To review the action of the court below, plaintiff prosecutes this writ of error.

It was stipulated by the parties that the premises in controversy are situated within the limits of the Cañada De Cochiti grant, as claimed and as surveyed and approved by the surveyor general of New Mexico on June 29, 1885; that the grant was never confirmed by congress on said report; that petitions were filed for the confirmation of the grant in the court of private land claims by one set of claimants on March 2, 1893, and by another set of claimants on March 3, 1893; that said grant was confirmed by decree of said court September 29, 1894; that the premises in controversy are not included within the boundaries of the grant as confirmed by said decree; and that appeal from said decree was taken to the supreme court of the United States, and was pending and undetermined at the time of the trial.

It is claimed by counsel for plaintiff that the premises in controversy being located within the boundaries of a claimed Mexican or Spanish grant, and which was at the time sub judice in the court of private land claims of the United States, the same was withdrawn or reserved from the public domain, and were not "lands belonging to the United States," open to exploration for mining purposes, within the meaning of section 2319 of the Revised Statutes of the United States. It is further claimed that, as a consequence of the foregoing proposition, the rights of the parties in this case are not to be determined by the ordinary rules governing the right to the possession of mining claims upon lands belonging to the United States, as established by the federal and territorial legislation, but they must be ascer-

tained by the rules of law applicable to contests for the possession of land where neither party has title or right to title, and where each must depend upon the priority, extent and continuity of actual possession.

The first of the foregoing contentions is controverted by counsel for defendants, and it is insisted that the premises in controversy, although within the boundaries of the Cañada De Cochiti grant, as claimed, are "lands belonging to the United States," within the meaning of section 2319 of the Revised Statutes of the United States, and subject to appropriation under the mining laws. It is important, therefore, to ascertain the status of these lands at the time of the entry of the parties thereon.

The lands in controversy are within the territory ceded to the United States by Mexico by the treaty of Guadalupe Hidalgo in 1848. Article 8 of that treaty (9 Stat. 922) provides that Mexicans established in the ceded territory shall be free to remain or to remove at any time, retaining the property they possess in the ceded territory or disposing of the same and removing the proceeds thereof; and further, that property of every kind belonging to Mexicans not established in the ceded territory shall be inviolably respected, the same as if the property belonged to citizens of the United States. This section of this treaty came directly under the consideration of the supreme court of the United States in the case of *Botiller* v. *Dominguez,* 130 U. S. 238, 9 Sup. Ct. 525. The case arose on the question as to whether a grant, perfect at the time of the treaty of Guadalupe Hidalgo, needed to be presented to the board of commissioners of California under the act of March 3, 1851, under penalty of forfeiture. The court say: "By the treaty of peace known as that of Guadalupe Hidalgo, of February 2, 1848 (9 Stat. 922), which closed the controversy and the war between the United States and Mexico, a cession was made of a very large territory by the government of Mexico to the

government of the United States. This was a transfer of the political dominion and of the proprietary interest in this land, but the government of Mexico caused to be inserted in the instrument certain provisions intended for the protection of private property owned by Mexicans within this territory at the time the treaty was made; and it may be conceded that the obligation of the United States to give such protection, both by this treaty and by the law of nations, was perfect. * * *" "Two propositions under this statute" [the act of March 3, 1851, requiring claimants of Mexican or Spanish grants in the state of California to present the same to the board of commissioners within a certain time under penalty of forfeiture] "are presented by counsel in support of the decision of the supreme court of California. The first of these is that the statute itself is invalid, as being in conflict with the provisions of the treaty with Mexico, and violating the protection which was guaranteed by it to the property of Mexican citizens, owned by them at the date of the treaty; also, in conflict with the rights of property under the constitution and laws of the United States, so far as it may affect titles perfected under Mexico. * * * With regard to the first of these propositions, it may be said that, so far as the act of congress is in conflict with the treaty with Mexico, that is a matter in which the court is bound to follow the statutory enactments of its own government. If the treaty was violated by this general statute, enacted for the purpose of ascertaining the validity of claims derived from the Mexican government, it was a matter of international concern, which the two states must determine by treaty, or by such other means as enables one state to enforce upon the other the obligations of a treaty. This court, in a class of cases like the present, has no power to set itself up as the instrumentality for enforcing the provisions of a treaty with a foreign nation which the government of the United States,

as sovereign power, chooses to disregard." We understand this case to mean that the treaty of Guadalupe Hidalgo established the duty upon the government of the United States to protect Mexican citizens in all of their rights of property which they possessed at the date of the treaty, but that we must look to the legislation of congress alone to ascertain what has been done in this regard, and that the treaty itself placed no restrictions whatever upon the disposition of any of these lands which the courts are bound to recognize. The same principle is recognized in *Pinkerton* v. *Le Doux,* 129 U. S. 346, 9 Sup. Ct. 399, and *Astiazaran* v. *Mining Co.,* 148 U. S. 80, 13 Sup. Ct. 457. The lands included in the grant in question as claimed, and as surveyed by the surveyor general of New Mexico, were reserved from sale or other disposal by section 8 of the act creating the offices of surveyor general of New Mexico, Kansas, and Nebraska, passed July 22, 1854. 10 Stat. 308. The section provides that the surveyor general should ascertain the origin, nature, character, and extent of all claims of land under the laws, usages, and customs of Spain, and make report thereon, which was to be laid before congress for such action thereon as might be deemed just and proper, with a view to confirm bona fide grants, and give full effect to the treaty of 1848 (Guadalupe Hidalgo). And the section further provides: "And until the final action of congress upon such claims, all lands covered shall be reserved from sale or other disposal by the government." Under this statute the surveyor general of New Mexico caused the land in question to be surveyed, and on June 29, 1885, approved the survey. But congress never acted on the report, nor confirmed the grant.

By the act of March 3, 1891 (1 Supp. Rev. St. U. S. p. 917), congress provided an entirely new method of ascertaining the rights of claimants to Spanish or Mexican land grants. It creates the court of private land claims, mentioned above in the stipulation of the parties, and confers

upon it the jurisdiction to hear and determine the rights of claimants on petition in all cases where the claims have not been confirmed by congress, or otherwise fully decided upon by lawful authority. The act further provides that the decree of the court of private land claims shall be final as to the rights of claimants, unless appeal be taken to the supreme court of the United States, in which case the decree of the latter court becomes a final adjudication of the rights of both claimant and the United States. It will therefore be seen that congress elected to abandon its control over the adjudication and settlement of these land titles, and to delegate the same to a new tribunal, clothed with full and complete powers in the premises. No reservation of the land within any claimed grant is contained in the act, but, on the other hand, section 15 of the act expressly repeals section 8 of the act of July 22, 1854, as follows: "That section eight of the act of congress approved July twenty-second, eighteen hundred and fifty-four, entitled 'An act to establish the offices of surveyor general of New Mexico, Kansas, and Nebraska, to grant donations to actual settlers therein, and for other purposes,' and all acts amendatory or in extension thereof, or supplementary thereto, and all acts or parts of acts inconsistent with the provisions of this act are hereby repealed." Section 14 of the act provides that the proceedings before the court of private land claims, if it shall appear that the land, or any part thereof, decreed to any claimant under the provisions of the act, shall have been sold, or granted by the United States to any other person, such title from the United States shall remain valid, and such court shall render judgment in favor of such grant claimant for the reasonable value of said lands so sold or granted.

It will thus be seen from these acts of congress that it has first established a reservation of the lands embraced within the boundaries of a claimed grant upon the report of the surveyor general, and that thereafter it has elected to repeal

the reservation, and the section of the act authorizing it, and to provide for compensating any grant claimant for any lands which the government may have elected to sell and dispose of within the boundaries of his grant. It seems clear to us, therefore, that there is no statutory reservation of any of the lands embraced within the boundaries of a claimed grant in New Mexico.

But it is urged by plaintiff that these lands have been held by the land department of the United States to be reserved, and that such construction is binding upon this court. We refer to a decision of Secretary Francis, reported in 24 Land Dec. Dep. Int. 1, in which he holds that by the terms of treaties between the United States and Mexico lands embraced within Mexican or Spanish grants were placed in a state of reservation, and by the act of March 3, 1891, the reservation is continued in force. We are also referred to certain decisions of the commissioner of the general land office, contained in letters of instruction to the surveyor general of New Mexico. In each of these decisions the secretary and the commissioner have sought to determine as a matter of law the status of lands embraced within a claimed Mexican grant. While it is true that a finding of fact made by an officer of the land department of the government in a matter with which that department is charged by law is binding upon the court, it has frequently been held that, where the land department of the government attempts to construe a law, their construction is not binding upon the courts. *Wisconsin Cent. R. Co.* v. *Forsythe,* 159 U. S. 46, 15 Sup. Ct. 1020.

It is further to be remarked that the right to the possession of a mining claim is never a matter for the determination of the land department of the government. The location and possession of a mining claim is determined by the federal and local legislation, and not until the locator seeks to obtain a patent for his mining claim does he come in con-

tact with the land department. And even then, if his right to the possession of the claim be contested, the whole matter is referred by the land department to the court for determination. We do not agree to the construction put upon the treaty of Guadalupe Hidalgo by the land department of the government, nor do we think that construction is borne out by the supreme court of the United States in the cases cited above. Neither any actual reservation of these lands by the land department, nor any statutory authority for making such reservation, has been called to our attention, and we assume that none exist.

There being no reservation of these lands within claimed grants in New Mexico by treaty, law, or authorized act of the executive department of the government (*Wolsey* v. *Chapman,* 101 U. S. 755), we conclude that they are not reserved lands, and are "lands belonging to the United States," within the meaning of section 2319 of the Revised Statutes of the United States.

These conclusions are borne out by a case which arose under the legislation of congress to settle the French and Spanish claims in the territory of Louisiana. On February 15, 1811, congress passed an act authorizing the president to offer for sale all lands which had been surveyed in the territory, but made the following reservation: "Provided, however, that till after the decision of congress thereon, no tract shall be offered for sale, the claim to which has been in due time and according to law" [under former acts of congress for ascertaining and adjusting titles and claims to lands within the territory of Orleans and the district of Louisiana and also in Missouri] "presented to the recorder of land titles in the district of Louisiana and filed in his office for the purpose of being investigated by the commissioners appointed for ascertaining the rights of persons claiming lands in the territory of Louisiana." This reservation was continued in force up to May 26, 1829, when it ceased until it was re-

vised by the act of July 9, 1832. A New Madrid location had been made by the defendant while this reservation was in force, upon a tract claimed and filed under the act of 1811 and supplementary acts thereto. In passing upon the effect of the reservation and the attempted entry under the New Madrid certificate, the court said: "His location was made on lands not liable to be thus appropriated, but expressly reserved; and this was the case when his patent was issued. Had entry been made, or the patent issued, after the 26th of May, 1829, when the reservation ceased, and before it was revived by the act of 1832, the title of the defendant could not be contested. *Stoddard* v. *Chambers,* 2 How. 285-318.

Numerous cases have arisen in California concerning the status of lands embraced within claimed grants in that state, but it will be seen that they were all determined upon the acts of congress peculiar to California, and different from the present state of congressional legislation. By the act of March 3, 1851 (9 Stat. 631), congress provided a commission to ascertain and settle the private land claims in the state of California. Section 13 of the act provides: "That all lands, the claims to which have been finally rejected by the commisisoners in manner herein provided, or which shall be finally decided to be invalid by the district or supreme court, and all claims, the claims to which shall not have been presented to said commissioners within two years after the date of this act, shall be deemed, held and considered as part of the public domain of the United States." The act of July 1, 1862 (12 Stat. 489), granted to certain railroad companies certain alternate sections of land on each side of their road, "not sold, reserved or otherwise disposed of by the United States, and to which a pre-emption or homestead claim may not have attached at the time the line of said road is definitely fixed." This grant afterwards enlarged (13 Stat. 358) and continued the reservation from

the grant by providing the grant "shall not defeat or impair any pre-emption, homestead, swamp land, or other lawful claim, nor include any government reservation or mineral lands, or the improvements of any bona fide settler." The grant to the railroad company took effect January 31, 1865, and the patent issued in 1870. Under the act of 1851, a claim for the Moquelamos Mexican or Spanish grant was duly filed with the commissioners, and was finally rejected by the supreme court of the United States on February 13, 1865. The land embraced therein thus became a part of the public land of the United States. The public land system was extended to California by the act of March 3, 1853 (10 Stat. 246), and after the rejection of the Moquelamos grant entry was made of a portion of the land formerly claimed thereunder, and patent issued subsequent to the patent to the railroad company. The grantee of the railroad company brought suit against the grantee of the past patentee to determine the ownership of a quarter section of land covered by both patents, and the supreme court of the United States, in *Newhall* v. *Sanger,* 92 U. S. 761, held that, by reason of the statutory reservation contained in the acts mentioned above, the railroad company did not take the land in controversy under its patent of 1870, and that the entry man under the general laws after the reservation of the act of 1851 ceased took the land under his subsequent patent. Reference is made in the opinion to the fact that the Mexican grant was sub judice at the time the grant to the railroad company took effect, but we do not understand the court to put its decision on this ground, but upon the express statutory reservation. Numerous other cases arising in California have been decided by the same court upon the same principle or in which the same principle was recognized. See *Van Reynegan* v. *Bolton,* 95 U. S. 33; *Hosmer* v. *Wallace,* 97 U. S. 575; *Trenouth* v. *San Francisco,* 100 U. S. 251; *Aurrecoechea* v. *Bangs,* 114 U. S. 381, 5 Sup. Ct. 892; *Doolan* v. *Carr,* 125

U. S. 618, 8 Sup. Ct. 1228; *U. S.* v. *McLaughlin,* 127 U. S. 428, 8 Sup. Ct. 1177; *Carr* v. *Quigley,* 149 U. S. 652, 13 Sup. Ct. 961. Some of the principles involved in the case under consideration have been discussed, and a like conclusion reached by this court, in *Grant* v. *Jaramillo,* 6 N. M. (Gild.) 313, 28 Pac. 508, and *Chavez* v. *Chavez de Sanchez,* 7 N. M. (Gild.) 58, 32 Pac. 137.

2. Under the foregoing conclusion this case must be determined upon the principles applicable to the ordinary contests for the possession of mining claims upon the public domain. The pertinent provisions of the laws of New Mexico in force at the time of the entry upon the lands in controversy by the parties are as follows: Section 2286 of the Compiled Laws of 1897 is as follows:

"Sec. 2286. Any person or persons desiring to locate a mining claim upon a vein or lode of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper or other valuable deposit, must distinctly make the location on the ground so that its boundaries may be readily traced, and post in some conspicuous place on such location a notice in writing stating thereon the name or names of the locator or locators, his or their intention to locate the mining claim, giving a description thereof by reference to some natural object or permanent monument as will identify the claims; and also within three months after posting such notice, cause to be recorded a copy thereof in the office of the recorder of the county in which the notice is posted. And, provided, no other record of such notice shall be necessary."

Sections 1 and 2 of chapter 25 of the Laws of 1889, are as follows:

"Section 1. That the locator or locators of any mining claim, located after this act shall take effect, shall, within ninety days from the date of taking possession of the same, sink a discovery shaft upon such claim to a depth of at least ten feet from the lowest part of the rim of such shaft at the

surface, exposing mineral in place, or shall drive a tunnel, adit or open cut upon such claim to at least ten feet below the surface, exposing mineral in place.

"Sec. 2. The surface boundaries of all mining claims hereafter located, shall be marked by four substantial posts or four substantial monuments of stone set at each corner of such claim. Such posts or monuments of stone shall each be plainly marked so as to indicate the direction of such claim from each monument of stone or post."

It will be seen that the laws require that the locator of a mine post his location notice, mark his surface boundaries with four substantial posts or monuments, properly marked, and, within 90 days after taking possession, sink a shaft upon such claim at least 10 feet deep from the lowest part of the rim at the surface, exposing mineral in place, or drive a tunnel, adit, or open cut at least 10 feet below the surface, exposing mineral in place; and also within three months after posting such notice cause to be recorded a copy thereof in the office of the recorder of the county in which the notice is posted. The testimony offered in behalf of the plaintiff shows that he and his co-locators posted a location notice on the ground in controversy on July 10, 1893, calling it the Sampson Mining Claim, and that the same was not filed for record until December 9, 1893. The record discloses an entire absence of proof of a compliance with any of the other essential elements of a valid location, save a discovery of mineral. Plaintiff introduced an amended location notice of the locators under which defendants claim, dated December 16, 1893, which was duly recorded December 30, 1893, and which recites that it is an amended location of the Washington mining claim, the original whereof was made October 23, 1893. No evidence was offered to show that the locators of the Washington mine exercised dominion over the premises as locators prior to October 23, 1893, and in fact proof was offered—but which was excluded on other

grounds—which tended to show affirmatively that they did not appropriate the ground prior to that time. This suit was instituted on June 21, 1895, and nothing was done or attempted to be done to perfect the Sampson location between July 10, 1893, the date of location, and June 21, 1895, the date of commencing action, except as above recited. There is no evidence in the record to show that the entry of defendants was otherwise than peaceable. Under this state of facts, and other facts to be hereafter discussed, the court directed a verdict for the defendants, and we think he committed no error. It is not to be questioned in this or any other court that a compliance with the federal and territorial statutes is necessary to perfect and preserve one's rights to the possession of a mining claim. "The right to possession comes only from a valid location. Consequently, if there is not location, there can be no possession under it. Location does not necessarily follow from possession, but possession from location. A location is not made from taking possession alone, but by working on the ground, recording, and doing whatever else is required for that purpose by the act of congress and the local laws and regulations." *Belk* v. *Meagher,* 104 U. S. 284.

And a compliance with the local laws in regard to the acts required by them to be done to make a valid location was necessary on the part of the plaintiff and his co-locators under penalty of forfeiture. *Faxon* v. *Barnard,* 4 Fed. 702; *Mallett* v. *Mining Co.,* 1 Nev. 188.

When the time expired within which those acts of location were to be performed under the statute, the land embraced within plaintiff's location became open and subject to location and appropriation by any qualified person. Plaintiff's rights had become forfeited and extinguished, at least as against a subsequent locator coming in before the defects in plaintiff's location had been cured. It was necessary for the plaintiff,

before he could maintain ejectment, to show a valid location. *Wills* v. *Blaine,* 5 N. M. (Gild.) 238, 20 Pac. 798.

The facts showing that a forfeiture had taken place at the time of the location of the Washington mine, it was the duty of the court to take the case from the jury. *Fairbanks* v. *Woodhouse,* 6 Cal. 434.

3. The plaintiff offered evidence tending to show that the plaintiff and one Johnson entered into a contract with one Pilkey, such as is commonly called a grub-stake contract, and thereunder Pilkey located the premises as the Sampson mine, in the names of the three parties; that before the expiration of the 90 days after location within which the same might be perfected Pilkey entered into a conspiracy with some of the defendants to locate the ground, and to defraud plaintiff and Johnson of their rights; that in pursuance of such conspiracy the locators of the Washington mine visited the premises before the expiration of the 90 days, took samples therefrom for assay, and looked the ground over, and remained in the vicinity until the claim became forfeited, and afterwards located it; that Pilkey had an equitable interest in the new location. Some of this evidence was admitted and some excluded, but we think it should have been excluded as immaterial. When the Sampson location became forfeited, the land claimed thereunder became public domain, and open to location. It was the same as if it never had been made as against a subsequent locator. No matter how firmly Pilkey was bound in law or in morals to perfect the location of the Sampson, the fact remains that he did not do so, and the claim consequently became forfeited. *Saunders* v. *Mackey* (Mont.) 6 Pac. 361. And the fact of his conspiracy with others, if true, is entirely immaterial. *Doherty* v. *Morris* (Colo. Sup.) 16 Pac. 911. We do not wish to be understood as denying the proposition that, if the relation of Pilkey to the plaintiff were such as to make him plaintiff's

trustee in the Washington location, he might be charged as such in a proper proceeding for that purpose as to any interest if any, he might have therein. *Saunders* v. *Mackey* (Mont.) 6 Pac. 361; *Hunt* v. *Patchin,* 35 Fed. 816. But this is an action of ejectment, based upon the Sampson location, which had become forfeited.

4. It appears from the transcript that this case was tried in the court below upon a theory that the lands in controversy were not open to location as lands of the United States, being a part of the Cochiti grant, as claimed. The court evidently was led into this error by the contention of counsel for plaintiff and by the implied or actual admission of counsel for defendants. The case was tried upon the question of prior possession in the plaintiff, and whether he had lost his actual possession by abandonment at the time of the entry by the locators of the Washington. This led to the introduction of a vast amount of testimony concerning actual possession, and acts and intentions of plaintiff as to abandonment of the claim, all of which, we have seen, was entirely immaterial under the views above expressed. At the close of the testimony the court took the case from the jury. It may be that as the case stood at the close of the trial, under the theory upon which it was tried, there were questions of fact which should have been submitted to the jury. But the plaintiff, in his proof, went into all the questions involving the validity or invalidity of his location of the Sampson mine. He showed every element of a mining location which he could show, and not only failed to show a valid location, but showed affirmatively that his location was forfeited and void at the time of the location of the Washington mine. It is therefore clear that to remand this case for a new trial would be an empty ceremony. The result of a new trial could not but bring the same result. The assigning of a wrong reason for an act by the court below is not error if the act done was, in law, right. *Wisner* v. *Brown,* 122 U. S. 214, 7 Sup. Ct. 1156.

Where the plaintiff's case is inherently and fatally defective, and is incurable, the defendant is entitled to have the judgment affirmed, notwithstanding errors of the trial court. *Barth* v. *Clise,* 12 Wall. 400; *Evans* v. *Pike,* 118 U. S. 241, 6 Sup. Ct. 1090. We decide, therefore, that the court, in directing a verdict for the defendants, committed no error.

5. This case was decided by this court at the last term, and the cause remanded for a new trial. 50 Pac. 318. Motion for rehearing was made and allowed. Two points are made in the motion. The second is that the court in its former opinion failed to pass upon the proposition as to the status of lands within claimed grants in New Mexico. As this underlies all questions raised, we have been compelled to examine the whole case.

We cannot agree with the conclusion reached by this court on the former hearing of this case. It cannot be questioned that it was the duty of plaintiff to see that all requirements as to location were complied with, under penalty of forfeiture. He testifies that the first he learned of any adverse claim by defendants was after the expiration of 90 days, and that he never visited the claim until long afterwards. Plaintiff failed to show, or offer to show, that he was prevented in any way from perfecting his location by reason of any unlawful entry and ouster by defendants prior to the expiration of the 90 days, and he showed the location under which defendants justified to have been made after the 90 days expired. Upon this state of facts this court upon a former hearing held that it was immaterial for the plaintiff to be permitted to show any act of dominion or adverse possession by defendants, prior to the expiration of the 90 days, as an excuse for his failure to perfect his location. But we cannot agree to this conclusion. These acts of defendants, if any were done, must have in some way prevented the plaintiff from perfecting his location. It cannot be said that a locator may calmly wait until his location becomes forfeited, and

then offer as an excuse the fact that he afterwards learns that others were holding adversely to him during the time he might have perfected his claim. If he was prevented from perfecting his claim by a wrongful intrusion, and by threats of violence if he should attempt to resume possession, this would furnish a complete excuse. *Erhardt* v. *Boaro,* 113 U. S. 527-534, 5 Sup. Ct. 560. But no such proof was offered. If this were an action of trespass for damages to the premises while plaintiff had the right to them, such proof might be material. But we cannot see how it can be in view of the facts in this case. Another portion of the opinion deals with the question of abandonment and the proof competent thereunder, but, in our view of the case, this discussion is not pertinent. We cannot follow the conclusion reached at the former hearing by this court, and the same is overruled.

This disposes of all the assignments of error. We find no reversible error in the record, and the judgment of the lower court will be affirmed, and it is so ordered.

MILLS, C. J., CRUMPACKER and MCFIE, JJ., concur.

LELAND, J., did not sit in this case.

KELLEY ET AL. v. BOETTCHER ET AL.

CURRAN ET AL. v. CAMPION ET AL.

(89 Federal 125. U. S. Circuit Court, District of Colorado. September 28, 1898.)

Circumstances determining the appointment. On a preliminary hearing for the appointment of a receiver, the questions which should be determined are whether it is probable that, on the final hearing, the allegations of the bill will be made good by competent proof, and whether the character and situation of the property are such that it ought to be taken into judicial custody in the meantime, for the purpose of preserving the rights of all parties.

Defendants solvent and holding apparent good title. Where defendants in a suit for the recovery of property and an accounting for profits have been in undisturbed possession for a number of years under an apparently good title, the presumptions of law are in their favor; and if they are solvent and able to respond for any injury done to the property, as well as for any profits that may be derived from it after the application is preferred, a receiver will not be appointed.

These are suits in equity for the cancellation of conveyances of mining property and an accounting for profits therefrom. Heard on preliminary applications for an injunction and the appointment of a receiver.

E. B. GREEN, for complainants.

CHARLES J. HUGHES, JR., for defendants.

Plaintiff procuring receiver to work a mine is personally liable for deficiency if receiver work at a loss. *Welch* v. *Renshaw*, 14 Colo. App. 526; 20 M. R. —.

Solvent corporation should have the management of its mines restored to it. *Forrester* v. *Boston Co.* 22 Mont. 430; 56 Pac. 868.

Appointment of receiver when a mine is in adverse possession. *Alvord* v. *Strickler*, 10 Colo. 89; 14 Pac. 117.

Funds advanced by claimants to work oil lands are to be reimbursed to the winning side. *Elk Fork Co.* v. *Jennings*, 90 Fed. 767.

Practice on appeal of receivership case and accounts in Montana stated. *State* v. *Dist. Court*, (Mont.) 72 Pac. 613.

THAYER, Circuit Judge. The application which has been made in each of the above-entitled cases for an injunction and the appointment of a receiver for the Little Johnny lode mining claim is based upon bills of complaint which contain collectively the following allegations: About the year 1880, Thomas J. Kelley and others located the Little Johnny mining claim, on Breece Hill, near Leadville, Colo. Thereafter, in November, 1886, Thomas J. Kelley died, seized of an undivided one-sixth interest in said claim, which interest, upon his death, became the property of the complainants in case No. 3,265, who were his heirs at law. John Curran was also one of the locators of said mining claim, and he also died on August 19, 1890, seized of another undivided one-sixth interest in said claim, which became the property of the complainants in case No. 3,298, who were his heirs at law. The defendants Boettcher, Campion, Hunter, and some other persons wrongfully acquired possession of said Little Johnny mine in January, 1883, and retained such possession until March, 1891, during which period they worked said mine successfully, and appropriated all the net proceeds thereof, which amounted to not less than $5,000,000, over and above all operating expenses. In January, 1891, the defendants Boettcher, Campion, Hunter, and others organized the Ibex Mining Company, and thereupon turned over the possession of the aforesaid mine to said mining company, of which they were directors and managers. When the mine was thus turned over to the Ibex Mining Company, it was a valuable gold mine, worth from $25,000,000 to $50,000,000, which had already yielded gold ore worth $5,000,000; and, since it has been in the possession of the Ibex Mining Company, it has continued to produce not less than $300,000 per month, all of which the defendants, including said Ibex Mining Company, have wrongfully and fraudulently appropriated to their own use. The Ibex Mining Company was organized by the individual defendants

above named, not in good faith, but for the sole purpose of using the same as a means of defrauding the heirs of Kelley and Curran, and depriving them of their rightful interests in the Little Johnny mining claim. In execution of such fraudulent purpose, the defendants, in November, 1892, employed one Charles C. Reger as their agent, to negotiate for the purchase of the interest of the Kelley heirs in said claim. Reger visited Galena, Ill., where said Kelley heirs resided, and succeeded in buying all the right, title, and interest of said heirs in and to said mining claim for the sum of $1,000. The conveyance of said interest was made by the Kelley heirs to the defendant Boettcher on January 16, 1893, and was induced by false and fraudulent representations of said Reger, to the effect that the Little Johnny mining claim was of no value; that no ore of any consequence had ever been discovered in the claim; that the shafts which had been sunk thereon were then filled with water; that no one could examine the mine because of the water; that it would cost an immense sum to drain the property; and that the property had never paid expenses. When these representations were made, the mine was in fact of immense value, as the defendants were well aware, and they had already received about $1,000,000 for ores previously extracted therefrom, which sum in fact belonged to the complainants, as the heirs of said Thomas J. Kelley. The purchase price of the mine was paid out of the previous products of the mine, which belonged to the complainants, and other portions thereof had been invested by the defendants in the purchase of several adjoining mining claims, which were also of great value. About the month of August, 1893, the defendants employed Edward Dale and Charles C. Reger to purchase the one-sixth interest of John Curran (who was then deceased) in the Little Johnny mine; and through the joint efforts of said Dale and Reger, and by means of false and fraudulent representations similar to those last above described, they suc-

ceeded, on September 7, 1893, in obtaining from the heirs of said John Curran (who are the complainants in case No. 3,298), a conveyance of all their right, title, and interest in and to said mine, including a relinquishment of all their claims on account of ore previously extracted therefrom, for the price and sum of $3,500. The conveyance by the Curran heirs was made to the defendant A. V. Hunter, but eventually Boettcher and Hunter conveyed the interests in the mine which they had respectively acquired to the Ibex Mining Company. Such, in substance, are the material allegations contained in the bills of complaint, and the relief prayed for is the cancellation of the respective conveyances by the heirs of Kelley and Curran to Boettcher and Hunter, and the cancellation of the conveyances subsequently made by them to the Ibex Mining Company. The bills also seek an accounting and general relief.

The defendants have each filed lengthy answers to the respective bills, in which they deny, under oath and in detail, all charges of fraud and collusion therein contained. In support of the bills and answers, numerous affidavits have been read by the parties, all of which have received careful attention. As a result of such examination of the moving papers, one general conclusion may be announced at the outset, namely, that the allegations made by the complainants in their respective bills touching the output and value of the Little Johnny mine are grossly exaggerated and misleading, and that other statements therein contained concerning the time and manner in which the defendants first acquired possession of the property in controversy are without foundation in fact. The testimony heard in support of the motions satisfies the court that none of the defendants had any connection with the Little Johnny mine, or interest therein, until about March 15, 1891. The evidence shows, and there is no proof to the contrary, that Thomas J. Kelley, John Curran, and other locators of the Little Johnny claim, entered

into a contract for the sale of a five-sixths interest therein to one Henry M. Dunning and others, some time in the year 1880; that the purchase price was to be paid by Dunning and his associates only out of the net profits which they might derive from working and developing the claim; that Kelley and Curran and the other locators of the claim turned over the possession thereof to Dunning and his associates when the contract of sale was executed, by whom and their successors in interest the mine was worked at intervals until about March 15, 1891; and that during said period there was a net loss of about $110,000, in attempts made to find ore and work the mine at a profit. In March, 1891, the defendant John F. Campion and others were employed by the then owners of the Dunning contract, to wit, by F. F. Jeffrey and John Harvey, to further develop and work the mining claim in question, under an agreement whereby Campion and others were to work and develop it at their own expense, and were to receive for their services 85 per cent. of the net smelter returns of all ore yielding less than $20 per ton, and 80 per cent. of all ore yielding more than $20 per ton. This contract of employment was transferred by Campion and his associates to the Ibex Mining Company, which was organized in March, 1891; and under the provisions thereof the mining company continued to develop and work the mine until some time in the year 1895, when the interests of the Kelley and Curran heirs, and some other interests which had then been purchased, were conveyed to it. Such, in brief, as disclosed by the proofs now before the court, would seem to be a correct account of the defendants' early connection with the mine in controversy, and of its output down to the month of March, 1891. Up to that time it had not yielded any returns over the aggregate cost of development, but showed an excess of expenditures over receipts amounting to $110,000. Subsequently to March, 1891, the mine was confessedly worked at a profit. It stands ad-

mitted by the answers and affidavits which have been filed by the defendants that after the Ibex Mining Company acquired possession of the property, on March 30, 1891, and between that date and January 16, 1893, when the Kelley interest was conveyed to Boettcher, ores were extracted from the mine by the Ibex Company which were of the gross value of $260,060.93. The defendants say, however, and the court sees no reason for doubting the statement, that these returns were obtained at a cost of at least $150,000, of which sum over $125,000 was expended in development work done upon the mine before any profit was realized.

In view of these admissions, it is obvious that the statements which are said to have been made to the Kelley and Curran heirs by Reger and Dale in the years 1892 and 1893, to induce them to part with their interests in the mine, were false and misleading, and operated as a fraud if the complainants were in fact influenced by such representations to part with their interest in the property. The chief questions, therefore, to be considered on the present occasion, are these: Were the alleged representations in fact made by Reger and Dale to induce the conveyance of the complainants' interests in the mine, and were Reger and Dale acting at the time as agents of the defendants or either of them in making the purchase? As the case is now before the court on a motion for the appointment of a receiver, it would be manifestly improper to prejudge the case by a definite finding upon either of these issues of fact. A sound rule which ought to be observed on such preliminary hearings is that the court should determine whether it is probable that on the final hearing of the case the allegations of the bill will be made good by competent proof, and whether the character and situation of the property is such that it ought to be taken into judicial custody in the meantime, for the purpose of preserving the rights of all parties in interest. If, upon a careful consideration of the pleadings and other moving

papers, there is a strong probability of ultimate recovery, and the character of the property is such that it may deteriorate in value before there can be a full and final investigation of the case, the right and duty of the court to appoint a receiver is clear. Pom. Eq. Jur. (2d Ed.) § 1331, and citations. The converse of this proposition must also be true; that if a recovery on final hearing seems doubtful, or if it is probable that the property in controversy will not suffer any deterioration in value prior to that time, or if the defendants have been in the undisturbed possession of the property for a number of years under an apparently good title, and are solvent and abundantly able to respond for any injury that may be done to it, as well as for any profits that may be derived therefrom after the application for a receiver is preferred, then a receiver ought not to be appointed. Adequate reasons should exist and be shown in all cases to warrant a court in depriving parties of the possession of property to which they have a good record title, and of which they have had peaceful possession for a series of years. All of the presumptions of law are in their favor.

Proceeding in accordance with these views, it is to be observed that the defendants, in their several answers, have denied under oath, but on information and belief, that either Reger or Dale made the false representations which are set forth in the two bills of complaint. This denial of the alleged fraud is supported by the affidavits of Reger and Dale, in which they respectively deny under oath, and in positive and direct terms, that they made the alleged false statements and representations which are attributed to them in the bills of complaint. Moreover, the defendants have denied under oath, both by answer and affidavit, that either Reger or Dale acted as their agent in purchasing the interests of the Kelley and Curran heirs in the Little Johnny mine; the contention of the defendants being that these interests were purchased by Reger and Dale on their own account, as a private specula-

tion, after they had ascertained by conversations with Hunter and Campion at what price the interests of said heirs could be resold if they succeeded in buying them. In other words, the defendants deny under oath all accountability for the acts of Reger and Dale, whatever they may have been, on the ground that they never employed or authorized them to purchase the interests of the Kelley and Curran heirs in their name or on their account. It may be conceded, on the other hand, that the complainants have filed a few affidavits which give some additional weight to the charge contained in the bills that Reger and Dale made the representations therein alleged to induce the complainants to sell their interests in the mine; but the court is not able to say that they have produced any additional proof that, in making the purchase, either Reger or Dale was acting as agent for the defendants, or either of them. The charge that they were so acting is supported simply by the averments of the bills, and such inferences as may possibly be drawn from the manner in which the conveyances of those interests were executed. The court is of opinion, therefore, that a correct conclusion touching the charge of fraud which is contained in the bills can only be reached after a full opportunity has been afforded for the examination and cross-examination of witnesses, and that, on the present showing, it would not be warranted in ousting the defendants from the possession of the property on the assumption that the fraud charged in the bills will probably be established on the final hearing of the case. The court is furthermore of opinion that it is unnecessary at present to appoint a receiver of the property in controversy for the purpose of guarding against possible loss or damage to the complainants, even if it should be conceded that the moving papers do disclose a reasonable probability of ultimate recovery. It is obvious that the appointment of a receiver will afford the complainants no protection for what has already been done or accomplished, and that such action

could only be justified on the ground that it is necessary to protect the complainants against some future loss which seems imminent.

In view of this fact, it will be well to refer briefly to the present situation of the property, as disclosed by the evidence. The complainants charge in their bills, and support the charge, possibly, by one or more affidavits, that the defendants are making vigorous efforts to exhaust the mine, and conceal the products thereof, before a final determination of the case can be reached. On the other hand, the defendants have filed affidavits of persons who are doubtless entirely familiar with the past and present output of the mine and its present condition, showing that the total net product of the mine for the two years preceding September 8, 1898, has not exceeded $36,000; that no ore has been shipped or mined from the Little Johnny lode for the past six months; that the great bulk of ore heretofore taken from the lode which paid smelter charges ran from $15 to $30 per ton; that the cost of mining the same was somewhat in excess of $9 per ton; that the highest of the smelter returns from ore ever taken from the lode was $197.04 per ton; that the mine is what is known as a "wet mine," requiring constant pumping by a large and expensive pumping plant to keep it free from water and prevent its destruction; and that the pumping plant by which said mine and several other mines in the immediate vicinity are now, and for some years past have been, kept free from water, is located on one of said other claims, known as the Uncle Sam lode mining claim. It furthermore appears that the Ibex Mining Company and the individual defendants as well are entirely solvent, and able to respond for the value of such ores as may in future be extracted from the property in controversy, and that they have made no effort to conceal or remove their property, or any of it, beyond the jurisdiction of the court. In view of these sworn statements, which the court on the present showing sees no reason to distrust, the

conclusion is inevitable that it would not be warranted in appointing a receiver or granting an injunction. Such action on the part of the court, if taken, might well be characterized as an abuse of judicial discretion. In the opinion of the court, adequate relief will be afforded to the complainants by requiring the defendants to file in court, for inspection by the complainants, a map or plat showing all of the present underground workings of the Little Johnny mine, and also requiring them to file within the first 15 days of each month, beginning with October, 1898, a sworn statement made by the superintendent of the mine, showing the total quantity of ore extracted from the mine during the preceding month, and, by reference to the aforesaid map, the place whence it was derived, and the smelter returns therefrom. Such an order will be entered, and the application for a receiver and an injunction will be denied.

TYLER MINING CO. ET AL. v. LAST CHANCE MINING CO.

(90 Federal 15. Circuit Court of Appeals, Ninth Circuit. October 3, 1898.)

[1]**Judgment against sureties on dismissal.** A court of equity, on the dissolution of an injunction, may under its general powers, and in the absence of statutory provisions, have the damages occasioned by its issuance assessed under its own direction, and may render judgment therefor against the sureties as an incident to the principal suit.

Release of sureties by modification of injunction. Under the rule that the liability of a surety cannot be extended by implication beyond the express terms of his contract, sureties on a bond given to procure a restraining order, which order required the defendants to cease working a certain portion of a mine, and to refrain from removing or appropriating ore previously taken therefrom, cannot be held liable for damages accruing to defendants after a subsequent order, which continued such restraining order in force, but modified and changed it by permitting the working of the mine, and the disposition of the ore taken therefrom, under regulations prescribed by the court.

Cost of pumping as damages. In a suit to enjoin defendant from the further working of a mine beyond the alleged limits of its claim, in which a temporary injunction was allowed, and by a subsequent order the court required the defendant to pump the water from its workings to permit an inspection by complainant's engineers, the complainant is liable on its bond, on a final determination of the suit in favor of defendant, for the cost of such pumping, though continued much longer than was necessary for the making of the inspection, where such continuance was solely by reason of the order and the complainant itself delayed its examination, and took no steps to have the work stopped.

Appeal from the Circuit Court of the United States for the District of Idaho.

[1]*Coosaw Co.* v. *Farmers Co.* 51 Fed. 107.

Counsel fees for the main suit not recoverable. Sale at price less than offered when injunction served, fixes no measure of damages. *Donahue* v. *Johnson*, 9 Wash. 187; 37 Pac. 322.

A party obeying an injunction, who is not bound to obey it, can-

This was a suit in equity to restrain the defendants from working certain mines within the alleged boundary of complainant's claim, and for an accounting for the ore taken therefrom. There was a decree for defendants, and a judgment for damages against complainant and the sureties on its injunction bond, from which they appeal.

JOHN R. MCBRIDE, for appellants.

W. B. HEYBURN, for appellee.

Before Gilbert and Ross, Circuit Judges, and Hawley, District Judge.

Ross, Circuit Judge. The Last Chance Mining Company, having discovered a vein of mineral bearing rock in place in the Shoshone mining district of the state of Idaho, for the purpose of acquiring it, located, under the laws of the United States, a claim thereon, in the form of a parallelogram, 1,500 feet in length and 600 feet in width. Shortly thereafter the Tyler Mining Company, finding a vein of mineral bearing rock in place in a northwesterly direction from the Last Chance location, made a location thereon, in the form of a

not recover on the bond. *Dunham* v. *Seiberling*, 12 Ind. App. 210; 39 N. E. 1044.

Counsel fees recoverable. Where sale under trust deed is enjoined less price received at sale later, an element of damages. *Belmont Co.* v. *Costigan*, 21 Colo. 465; 42 Pac. 650.

Lost profits of mining not recoverable. Dissolution gives no right to damages where the writ issued in a proper case. *Coosaw Co.* v. *Carolina Co.* 75 Fed. 860.

All parties must sue though some only are damaged. *Montana Co.* v. *St. Louis Co.* 19 Mont. 313; 48 Pac. 305.

Covers attorney's charges for dissolution of restraining order. *Montgomery* v. *Gilbert*, 24 Mont. 121; 60 Pac. 1038.

Not allowed to cover fall in value of the lease from "boom" values to nothing. *South Penn Oil Co.* v. *Stone*, (Tenn.) 57 S. W. 374.

parallelogram, 1,500 feet in length and 600 feet in width, the southeasterly corner of which overlapped the Last Chance location. Thereafter a piece of mining ground adjoining the Tyler on the southwest, and lying between it and the Last Chance, was located as the Republican Fraction; and adjoining that, and in part overlapping it, were located the Last Chance Fraction and Skookum Fraction claims. The Tyler Company having applied for a patent for its claim, a contest was initiated by the Last Chance Company in the United States land office, resulting in a suit in one of the courts of the state in which the claims are situated, and which culminated in a judgment establishing the right of the Last Chance Company to that part of the Tyler location that overlapped the prior location of the Last Chance Company. Thereupon the Tyler drew in its southeasterly end line so as to avoid the conflict, and its claim as so changed was subsequently patented by the government. Both the Tyler and Last Chance claims were extensively mined. The Tyler Company, claiming that its right in and to the vein having its apex within its surface lines, in its dip southerly beyond its side line, was being impinged upon by the underground working and mining thereof by the Last Chance Company, and by the owners of the Republican, Skookum, and Last Chance Fraction claims, commenced an action of ejectment in the court below against the Last Chance Company, the Idaho Mining Company (owner of the Skookum and Last Chance Fraction claims), the Republican Mining Company (owner of the Republican Fraction claim), and several individual defendants, to recover the possession of the vein so claimed by it, together with damages in the sum of $200,000, the alleged value of the ore therefrom averred to have been unlawfully extracted and appropriated by the defendants to the action. The action was subsequently dismissed as to the individual defendants. In aid of that action at law, the Tyler Company at the same time, or immediately

thereafter, filed in the same court the present bill in equity, against the same defendants, alleging the same rights on its part, and similar unlawful acts on the part of the defendants to the bill, and, alleging the threats of the defendants to continue the mining and appropriation of the ore from the vein to which the complainant alleged title, prayed among other things, the equitable interposition of the court restraining the defendants from mining and appropriating that ore, and a decree establishing the alleged rights of the complainant against the defendants.

The action at law was tried several times. At the first trial, in the circuit court, judgment was rendered in favor of the Last Chance Company, and against the Republican and Idaho Mining Companies, neither of which sued out a writ of error therefrom. The Tyler Company sued out a writ of error to this court, and the judgment in favor of the Last Chance Company was reversed. *Tyler M. Co.* v. *Last Chance M. Co.*, 4 C. C. A. 329, 54 Fed. 284, and 7 U. S. App. 463. Upon the second trial in the court below, judgment was rendered in favor of the Tyler Company against all of the defendants to the action. The Last Chance Company then sued out a writ of error to this court, and the judgment of the circuit court was affirmed. *Last Chance M. Co.* v. *Tyler M. Co.*, 9 C. C. A. 613, 61 Fed. 557. The case was then taken, on the application of the Last Chance Company, upon writ of certiorari, to the supreme court, where the judgments of this court and of the circuit court were reversed, and the cause remanded to the latter court, with instructions to grant a new trial. 157 U. S. 683, 15 Sup. Ct. 733. The judgment of this court was reversed solely upon the ground that it did not give the proper effect to the judgment of the state court of Idaho establishing priority in favor of the Last Chance location. Upon the third trial of the law case in the circuit court, judgment was rendered in favor of the Last Chance Company for its costs. Writs of error were sued out of this court both

by the plaintiff and the defendant Republican Mining Company to have that judgment reviewed, and resulted in its affirmance. *Mining Company* v. *Sweeney,* 24 C. C. A. 578, 79 Fed. 277. Both the district and circuit judges being absent from the district at the time of the filing of the bill in equity, it, together with certain affidavits, was presented by the complainant to Justice Field, of the supreme court, who thereupon made an order that the defendants appear before the court at its court room in Boise City, Idaho, on the 5th day of October, 1891, at 10 o'clock a. m. of that day, and then and there show cause why the preliminary injunction prayed for should not issue; and further granting the complainant's application for a restraining order pending such hearing upon its giving a bond, with two good and sufficient sureties, to be approved by the clerk of the court, in the penal sum of $20,000, securing the defendants to the suit against all loss or damage which might result from the issuing of the restraining order, if it should be finally determined that the same was improperly issued, or that might be awarded to them by reason of the granting of the restraining order. The bond thus required was executed by the Tyler Mining Company, and by H. B. Eastman, Alf. Eoff, James A. Pinney, and George Ainslie as sureties, and, being approved by the clerk of the court, the restraining order went into effect.

At the time designated in the order to show cause the parties appeared before the court,—the district judge presiding,—with their counsel, and after a hearing of the matter, the court, on the 9th day of October, 1891, ordered:

That the restraining order "be continued against said Last Chance Mining Company as a temporary injunction pending the trial of the cause, or until otherwise ordered by the court or judge, with the following modifications, to wit: The said Last Chance Mining Company may resume and continue work upon its said Last Chance Mine, and at any place within the limits of its boundary lines projected vertically downward; that all such work shall be done in the usual and ordinary course of mining, in an economical and

miner like manner, keeping in view the proper development, the benefit, and preservation of the property; that all ores extracted by such workings shall be stored at some convenient place upon the mine, or they may, as fast as extracted to the amount of the ordinary shipping lot, be shipped and sold, and the proceeds thereof deposited in the First National Bank at Spokane Falls, state of Washington, subject to the regulations hereinafter defined; that, for the purpose of assisting in the enforcement of this order, a competent person shall be appointed as an officer and agent of this court, whose duty it shall be to make such frequent visits to said Last Chance Mine as he shall deem necessary to keep himself fully advised of all the working operations thereof, and observe and report to the court any violation of this order in such operations, and examine all the accounts covering the expenditures and the receipts of such mining operations; that he shall make such arrangements with said defendant concerning the shipping and sale of the ores as he deems necessary to preserve the proceeds thereof as directed by this order, and to that end may require the ores to be shipped jointly in his and defendant's (Last Chance Mining Co.'s) names, and the proceeds deposited in said bank in their joint names; that he shall make arrangements by which, under his supervision, sufficient of such proceeds may be drawn from said bank, from time to time, to meet and pay the actual and necessary working expenses of such mining operations, and all remaining proceeds shall remain in said bank until the court or judge thereof shall direct such officer in the disposition to be made thereof; that said Last Chance Mining Company shall at all times permit such court officer, or agent to visit and inspect all parts of said mine and its workings, to examine all the accounts, books, and all transactions, as fully as though he had full charge of all such mining operations, and furnish him a copy of all such accounts when he shall demand them."

The order named F. R. Culbertson as such officer of the court; and further provided that the Last Chance Company should within 15 days, or within such time as the parties may agree upon, or the officer direct, proceed to remove the water from the workings of the Last Chance Company, in order that the same may be examined by the complainant, its witnesses, surveyor, and counsel; and also provided:

"That, at any time the parties affected by this order may agree upon modification hereof, they may act upon such modification, without procuring the formal order of the court approving the same,

but no such modification shall be acted upon until the same shall be reduced to writing, and signed by their respective counsel of record; also, it is ordered that a copy of any such modifying agreement must be transmitted to, and filed by, the clerk of this court."

In February, 1892, the first trial of the law action having resulted in a decision in favor of the defendants, the court, on the 9th day of that month, entered this order:

"Ordered that said restraining order be continued as to the defendants the Idaho Mining Company and the Republican Mining Company, and that the same be dissolved as to the defendant Last Chance Mining Company."

On the 6th day of March, 1893,—the second trial of the law action in the circuit court having resulted in favor of the plaintiff,—the court entered this order:

"In this case it is ordered that the injunction heretofore granted by Justice Field be continued as granted by said justice pending the litigation."

The third trial of the law action having resulted in a judgment that the plaintiff recover nothing against the Last Chance Mining Company, which was the principal defendant, that company in May, 1895, upon a petition setting out the various restraining and injunction orders above mentioned, and setting out "that the bond given by the complainant upon the granting of the injunction aforesaid, on the 1st day of September, 1891, became inoperative and void after the dissolution of said injunction, on the 9th day of February, 1892, and is not operative or effectual as to the injunction granted by this court on the 6th day of March, 1893; that the complainant has never given any bond in support of said injunction so granted on the 6th day of March, 1893,"—asked for a dissolution of the injunction ordered on the 6th day of March, 1893, for the failure on the part of the complainant to give a bond. This petition coming on to be heard, the court, on May 27, 1895, made this order:

"It appearing that on March 6, 1893, it was ordered that the injunction heretofore granted by Justice Field be continued as granted by said justice pending the litigation, and it also appearing that it was not then provided for a renewal of the bond before given by the plaintiff, the Tyler Mining Company, and that none has since been given by said plaintiff company, it is now, upon the motion of defendant the Last Chance Company, ordered that the said plaintiff, the Tyler Mining Company, prepare and file with the clerk a good and sufficient injunction bond in the sum of twenty thousand dollars, and that the same be done with all convenient speed, and that the same be submitted to the counsel for the Last Chance Mining Company before being filed with the clerk."

The bond thus required not having been filed, on June 15, 1895, the judge made an order requiring the Tyler Company to show cause, at a designated time and place "why the injunction heretofore granted against the respondents should not be discharged forthwith, unless before that day an injunction bond in the sum of twenty thousand dollars be made and filed as heretofore by me ordered to be done;" and on the 28th day of June, 1895, the bond not having been filed, and the Tyler Company having failed to show any cause against it, an order was entered "that the restraining order now existing against the defendants be and is dissolved."

No other proceedings were had or taken in this suit prior to May 26, 1897, on which day the cause was referred to a special master in chancery to take the testimony and report the same, with his findings to the court. The testimony was so taken, and the master reported it, together with his findings. The latter are to the effect that the issues involved in this suit were conclusively determined in favor of the complainant, as against the defendants Idaho Mining Company and Republican Mining Company, by the judgment of the circuit court made and entered on the 3d day of April, 1896, in the law action, as to all the property in controversy, and as to any vein having its apex within the surface lines of the Tyler claim, found between vertical planes drawn downward through the extended end lines of that claim; that by the same

judgment the issues involved in this suit were conclusively determined against the complainant, and in favor of the defendant Last Chance Mining Company, as to all the property in controversy within or beneath its surface lines, and having its apex therein, found between vertical planes drawn downward through its end lines extended, and as to the ore taken therefrom; that by the judgment in the law action the priority of location of the Last Chance claim over the Tyler claim is established; that the extralateral rights of the Tyler claim cease where the vertical plane drawn downward through the north side end line of the Last Chance claim is encountered; and that the Last Chance claim has the extralateral right to follow its ledge to the westward indefinitely upon a plane drawn on its end lines, which end lines are those that intersect the ledge in its course, and were originally located as side lines.

The evidence in the case given before the master, and by him reported to the court below, sustained these findings, and, upon exceptions thereto filed by the complainant, they were sustained by the court. The reasons for these conclusions will be found fully stated in the opinions heretofore referred to. In brief, they are these: Inasmuch as the Republican, Skookum, and Last Chance Fraction claims were located subsequent to that of the Tyler Company, and inasmuch as the vein having its apex within the surface lines of the Tyler location passed through its end lines, that company had the extralateral right conferred by the statute of the United States to follow it in its dip downward, as against any and all subsequent locators, until the planes drawn downward through its end lines, indefinitely extended, are encountered; but inasmuch as the location of the Last Chance claim was prior in time to the Tyler location, and inasmuch as, in point of fact, the vein having its apex within the surface lines of the Last Chance location is shown to be the same vein as that having its apex within the surface lines of the

Tyler claim, and in its course passes through the side lines of the Last Chance location, those side lines became the true end lines, and entitled the prior locator to follow the vein in its dip outside of its original end lines, but really side lines, indefinitely, until the planes drawn downward through its true side lines, extended indefinitely in their own direction, are encountered.

The suggestion of counsel for the appellant that the Last Chance Company, by its pleadings, disclaimed all interest in the vein in question, underneath the surface of the Republican and Last Chance Fraction claims, is not supported by the record. The Last Chance Company did disclaim any interest in either of those claims, but, inasmuch as the vein in question has its apex within the surface lines of the Last Chance location, and in its dip under the true side lines of the Last Chance location passes under the surface of the Republican and Last Chance Fraction claims, it is, in its descent as much a part of the Last Chance location as if entirely within its surface lines. It constitutes no part of the Republican or Last Chance Fraction claims, and therefore, in disclaiming any interest in those claims, the Last Chance Company did not thereby disclaim any interest in the vein.

The master also found the defendant Last Chance Company entitled to damages and costs by reason of the injunction, the amount of which he fixed at $14,000, and that the obligors, Eastman, Eoff, Pinney, and Ainslie, on the bond given under the restraining order made in September, 1891, were liable thereon for those damages. Exceptions were filed on behalf of the complainant to these findings, and, except as to the amount, were overruled by the court. The court reduced the amount to $9,418, for which sum, with interest thereon at 7 per cent. per annum from October 5, 1897, it gave judgment against the complainant and its bondsmen, the latter of whom were not parties to the suit. The present appeal is by the complainant and the bondsmen.

On behalf of the sureties on the bond, it is contended that no decree could be rendered against them because they were not parties to the suit; in support of which position *Bein* v. *Heath,* 12 How. 168, is cited and relied on, in which case Chief Justice Taney made this remark:

"A court proceeding according to the rules of equity cannot give a judgment against the obligors in an injunction bond when it dissolves the injunction. It merely orders the dissolution, leaving the obligee to proceed at law against the sureties, if he sustains damage from the delay occasioned by the injunction."

In the case of *Russell* v. *Farley,* 105 U. S. 433, 445, the court reviewed the case of *Bein* v. *Heath* as well as the decision of Mr. Justice Curtis in *Merryfield* v. *Jones,* 2 Curt. 306, Fed. Cas. No. 9,486, and said:

"Upon a careful examination, we are not satisfied that they furnish any good authority for disaffirming the power of the court having possession of the case, in the absence of any statute to the contrary, to have the damages assessed under its own direction. This is the ordinary course in the court of chancery in England, by whose practice the courts of the United States are governed, and seems to be in accordance with sound principle. The imposition of terms and conditions upon the parties before the court is an incident to its jurisdiction over the case; and, having possession of the principal case, it is fitting that it should have power to dispose of the incidents arising therein, and thus do complete justice, and put an end to further litigation. We are inclined to think that the court has this power, and that it is an inherent power, which does not depend on any provision in the bond that the party shall abide by such order as the court may make as to damages (which is the usual formula in England), nor on the existence of an express law or rule of court (as adopted in some of the states) that the damages may be ascertained, by reference or otherwise, as the court may direct; this being a mere appendage to the principal provision requiring a bond to be taken, and not conferring the power to take one, or to deal with it after it has been taken. But, while the court may have (we do not now undertake to decide that it has) the power to assess the damages, yet, if it has that power, it is in its discretion to exercise it or to leave the parties to an action at law. No doubt, in many cases, the latter course would be the more suitable and convenient one."

Since the intimation in *Russell* v. *Farley* it has been acted on by the federal courts in at least three cases. *Lea* v. *Deakin,* 13 Fed. 514; *Coosaw M. Co.* v. *Farmers' M. Co.,* 51 Fed. 107; *Lehman* v. *McQuown,* 31 Fed. 138. See, also, 2 Beach, Mod. Eq. Prac. § 770. Whether or not the bondsmen are entitled to notice is a question not raised by the assignments of error.

But for what did the bondsmen in the present case become liable? The bond was executed, as is expressly recited on its face, to secure the defendants to the suit in which it was given against all costs and damages which might be awarded to it in case the restraining order of September, 1891, should be finally determined to have been improperly issued. That order enjoined the defendants to the suit from working in or on any vein, lode, or ledge having its apex within the surface ground of the Tyler Company, and "from doing any work in the underground workings of the defendants, or any of them, at any point west of a line projected southerly from the southeast corner of said Tyler surface claim, and drawn downward perpendicularly through the earth from that point, or taking any ores therefrom, until the further order of this court, and from in any way interfering with any works, drifts, or excavations of said Tyler Company west of said line, either on the surface or beneath the surface;" and ordered "that, as to any and all ores heretofore mined in the space heretofore specified, by you, said defendants, or any of you, and not removed from said premises, you desist and refrain from removing or appropriating, but that you permit the same to be and remain thereon until otherwise ordered by the court." The sureties upon the bond obligated themselves to pay any damages, not exceeding $20,000, that might be awarded the defendants to the suit by reason of such restraining order, provided it should be finally decided that the order was improperly issued. The consideration of the bond was the cessation of the work, and desisting from removing or appropri-

ating the ore specified in the restraining order. That obligation could not be added to, nor, indeed, changed, by either party to the suit, nor by the court itself. That sureties are entitled to stand upon the strict letter of their contract is thoroughly well settled. In *Miller* v. *Stewart,* 9 Wheat. 680, 701, Mr. Justice Story said:

> "Nothing can be clearer, both upon principle and authority, than the doctrine that the liability of a surety is not to be extended, by implication, beyond the terms of his contract. To the extent, and in the manner, and under the circumstances, pointed out in his obligation, he is bound, and no further. It is not sufficient that he may sustain no injury by a change in the contract, or that it may even be for his benefit. He has a right to stand upon the very terms of his contract, and if he does not assent to any variation of it, and a variation is made, it is fatal. And courts of equity, as well as of law, have been in the constant habit of scanning the contracts of sureties with considerable strictness."

See, also, *Pickersgill* v. *Lahens,* 15 Wall. 144; High Inj. §§1636, 1638, 1677. When, therefore, the court, on the hearing in October, 1891, modified the restraining order by permitting the resumption of work under certain specified conditions, it did something which it undoubtedly had the power to do, and which was, perhaps, eminently wise to be done, but for which the sureties upon the bond given upon the issuance of the restraining order in no manner obligated themselves. The court did not require any other or further bond at that stage of the suit, nor was any other bond at any time given on behalf of the complainant.

The only items of damage found by the master to have been sustained by the Last Chance Company between the time of the going into effect of the restraining order and its modification, on the 9th day of October, 1891, were certain costs incurred by it under the rule to show cause, fixed by the master at $547.50, and allowed by the court below, and certain expenses incurred by the Last Chance Company in the preservation of the property during the time the order as originally

granted was in force, the amount of which was fixed by the master at $1,040, and reduced by the court below to $600. We see no error in the ruling of the court in respect to these items; but they are the only items of damage for which the appellant bondsmen are liable, as all of the others were sustained by the Last Chance Company under orders of the court for which these bondsmen in no manner obligated themselves.

The appellant company contests the item of $3,754.50 incurred by the Last Chance Company in pumping water from and cleaning out its levels under the order of the court made at the instance of the Tyler Company, so as to admit of inspection by its officers, attorneys, and witnesses in preparing for the trial of the suit. It is not claimed that no charge therefor should have been allowed, but it is contended that the work was continued longer than was necessary. To this objection the court below answered:

"I do not doubt that it was unnecessary to so long keep these levels open for inspection; all necessary examination should have been made in a short time. I had supposed that it was necessary to keep the water out, that the mine might be worked as permitted by the order of October 10, 1891, but it seems that the defendant continued to keep it out only because so ordered. As the complainant procured this for its own benefit, it should have looked to it that its witnesses make a speedy examination, and then have had the pumping stopped, as it easily might. Instead, it seems to have taken its own time, and have its witnesses make their examination from time to time as convenient. The complainant, and not the defendant, must pay for it."

In this we see no error, nor error in any other ruling of the court below in respect to the costs and damages allowed against the appellant company. The cause is remanded, with directions to the court below to modify the judgment in accordance with the views above expressed.

JOHN J. CAMBERS v. WILLIAM LOWRY ET AL.

(21 Montana 478; 54 Pac. 816. Supreme Court. October 10, 1898.)

Statutory directions do not exclude technical explanations. Under Civ. Code, §§ 2209, 2210, providing that the words of a contract are to be understood in their ordinary and popular sense, and that technical words are to be interpreted as usually understood by persons in the business to which they relate, the court may admit evidence of qualified witnesses to interpret the technical terms used in a mining lease according to the usual understanding of miners.

Meaning of level. A mining lease provided that there should be no ores stoped, except at the 300-foot level. Testimony of those familiar with technical mining terms showed that everything below the 200-foot level and above the 300-foot level is called the "300-foot level." *Held*, that stoping ore from the bottom of a 60-foot winze sunk from the 200-foot level was not a violation of the lease.

Appeal from District Court, Silver Bow County.

Bill by John J. Cambers against William Lowry and others. From an order denying a temporary injunction, plaintiff appeals. Affirmed.

Plaintiff, Cambers, sued defendant Lowry and others for damages for the breach of the conditions of a certain mining lease, and for an injunction enjoining defendants from working and mining the premises involved pending the suit. Upon hearing on an order to show cause, the district court refused to issue the injunction prayed for, and dissolved the temporary restraining order theretofore issued. The plaintiff appeals from the order refusing to grant an injunction pending the action, and dissolving said temporary restraining order.

Though the word level may have a local meaning it is not conclusive that the word was used in the contract with such meaning. *Clayton* v. *Gregson*, 9 M. R. 141.

The term level does not imply that the working must be horizontal. *Brain* v. *Harris*, 10 Exch. 908.

The lease and agreement between the parties in interest contains certain agreements on the part of the defendants in relation to cross-cuts in the mine, timbering and lagging of the drifts and cross-cuts, raises, winzes, and stopes. It also contains the following clause: "It is hereby expressly agreed that there shall be no ores stoped, except at the three hundred foot level, and all ores extracted shall be extracted from the drifts, raises, or winzes."

Among other allegations in the complaint, it is alleged that in extracting ores from the drifts, winzes, stopes, and other workings, the defendants have gone outside the same, contrary to the covenants of the lease, and have failed to timber or lag said outside portions; that the winze sunk by the defendants from the two hundred foot level is over ten feet wide, etc., and that defendants are stoping valuable ores from said mine at a point between the two hundred and three hundred foot levels, at points near said two hundred foot level, and between the drift about forty-six feet below the two hundred foot level, said stoping all being between said drift and said two hundred foot level, there having been and being no stoping whatever below said drift, and no stoping having been done at said three hundred foot level, and that defendants have extracted ores from the mine, other than from said drifts, raises, and winzes, in violation of the covenants of the lease; that defendants, in violation of the covenants requiring all ores to be extracted from the drifts, raises, and winzes, are extracting ores outside and beyond said drifts, raises, and winzes, to the injury of the value of the mine; that defendants intend to extract all of the ores between said two hundred and three hundred foot levels, and other parts of the mine outside of the workings within which they should have been confined; and that defendants, in violation of the terms of the lease, ran a winze from the two hundred foot level to a depth of fifty or sixty feet, and at the bottom of the winze made a level, and stoped ore from the back of the level.

L. J. HAMILTON, FRANCIS BROOKS and B. S. SHUSTER, for appellant.

CLAYBERG, CORBETT & GUNN, J. B. WELCOME, and H. LOWNDES MAURY, for respondents.

HUNT, J. (after stating the facts). If the terms of the lease confined the defendants, in the extraction of ore, literally to the 300-foot level, plaintiff was entitled to the injunction order prayed for; but if it was the intent of the parties to the lease that defendants could stope above the 300-foot level, and below the 200, the district court properly denied the injunction. We so state the proposition involved, because the real contention between the parties confessedly arises over that clause in the lease which forbids stoping "except at the 300-foot level," and which requires all ores to be extracted "from the drifts, raises, and winzes," and because it appeared in the evidence heard that the stoping done by defendants was confined to the bottom of the winze, some 50 feet below the 200-foot level.

The lease contains numerous mining terms,—for instance, "lagging," "stopes," "raises," "winzes," "drifts," "levels," and others,—the significations of which, as used between mining men, are peculiar, and are so understood between them in their mutual agreements concerning mining properties, but which are not wholly clear to those unfamiliar with their meaning with relation to the particular subject-matter of mines. The learned judge who heard the testimony in the court below evidently believed that the case was one where evidence was properly admissible to interpret the technical terms used according to the usual understanding of miners and others engaged in the business of mining, and under sections 2209 and 2210 of the Civil Code, and by the authority of this court in *Newell* v. *Nicholson*, 17 Mont. 389, 43 Pac. 180, permitted qualified witnesses to testify in explanation of

the words used in that clause of the lease over which this controversy arose. We affirm the ruling admitting such testimony, as sanctioned not only by our own court in the case cited, but by the very high authority of Lord Chief Justice Denman in *Clayton* v. *Gregson,* 5 Adol. & E. 302, where evidence was allowed to show the understanding among coal miners of the term "level" as used in a lease of a coal mine. Just what was meant, therefore, by the expression "stoping at the 300-foot level," and what was the "300-foot level," of the mine,and to what level ore between the 200 and 300-foot levels belonged, in the usage and custom of working mines, and whether or not ore taken by stoping from the bottom of a winze sunk from the 200-foot level was "300-foot ore" or not, were questions to be correctly answered after hearing parol evidence of the sense in which they are usually received when used by persons when engaged in mining.

From the record before us it appeared in evidence that "everything above the 300 and below the 200 level" is called the "300-foot level;" that, "if a man wanted to go to the 300-foot level of a mine, * * * he would stay right on the level," but, if told to "stope at the 300-foot level," he would be expected to go "to any point between the 200 and 300 [levels],—it might be five feet below 200, and the ore would be carried to the 300-foot level;" and that ore between the 200 and 300 levels, although "all tributary to the 300-foot level, * * * is not always taken out at the 300-foot level." From evidence of this character, the court, to give practical effect to the lease, rather than an effect which would confine defendants, in the extraction of ore, to the 300-foot level alone, by which interpretation defendants would substantially be denied the right to extract any ore from the mine, concluded that the intent of the language used was that the lessee "be restricted to the stoping of ores above the 300-foot level and below the 200." "It matters not," added the judge in his memorandum opinion, "that they commenced to

work and extract ores between the two levels referred to. If they had started at the 300, and stoped up to the point where they were working when temporarily restrained, there would have been no controversy, and there is now no just cause for complaint."

There were conflicts in the evidence as to the meaning of the terms of the lease above discussed; plaintiff's witnesses testifying that, under the provision of this lease above referred to, stoping would begin at the "back" of the 300-foot level, and that ore would be taken down to and through the 300-foot level of the mine; and there were conflicts likewise as to timbering of the mine, but they, like the others, were resolved in defendants' favor.

Under the firmly established rule of this court, following recognized principles of law, the granting or refusing to grant preliminary injunctions is so largely a matter of discretion in the district courts that the supreme court "will be very slow to interfere with the exercise of that discretion." We find nothing in this case to warrant a departure from that rule, and the order of the district court cannot be disturbed.

Affirmed.

PEMBERTON, C. J., and PIGOTT, J., concur.

THE COLORADO FUEL & IRON CO. v. PEYOR.

(25 Colorado 540; 57 Pac. 51. Supreme Court. October 10, 1898.)

The royalty reserved makes a good consideration for a lease and it will be held valid notwithstanding it covenant to give monopoly trade to a supply store, if such covenant be treated as void for reasons of public policy.

[1]**One taking a lease of a half interest** from one of the co-owners cannot plead that the lease was void for want of the consent of the other co-owner, such co-owner having made no objection.

[2]**Proof of existence of coal by development on adjoining land.** Facts recited and held sufficient proof of the existence of coal under the demised ground.

Merchantable coal. Review of disputed evidence upholding a finding that the coal under the leased land was of merchantable quality.

[3]**Lessees not bound to work at a loss.** In the absence of express covenants the implied covenant to keep at work does not apply where the coal could not have been extracted to a profit. And to recover substantial damages, to wit; the royalty on the coal which the lessees could have mined, the lessor must prove that it was workable to a profit.

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[1]The lease of one co-owner purporting to cover the whole ground is not void but passes his own interest. *Harlan* v. *Central Ph. Co.* (Tenn.) 62 S. W. 614.

The lessee of one co-owner may recover in trespass against another of the co-owners for taking away the ore so mined by such tenant. *Blewett* v. *Coleman*, 11 M. R. 160.

A notice by one of several co-owners is effective only as to his own interest. *Updegraff* v. *Lesem*, 15 Colo. App. 297; 20 M. R. —.

An assignment by one co-lessor does not affect the status of the tenant to the rent. *Swint* v. *McCalmont Oil Co.* 184 Pa. 202; 38 Atl. 1021.

[2]Proportions of nut and lump coal obtained from adjacent lands is not proof that the same product would have been the result of working the demised lands. *Bestwick* v. *Ormsby Coal Co.* 129 Pa. 592; 18 Atl. 538.

On the question of whether two veins unite in disputed ground it may be shown that their directions outside of as well as within the disputed ground are such that, if continuous, they would meet. *Cons. Wyo. Co.* v. *Champion Co.* 18 M. R. 113.

[3]*Newton* v. *Nock*, 7 M. R. 611. *Jones* v. *Shears*, 8 M. R. 333.

Appeal from the District Court of Pueblo County.

Appellee bases his right to a recovery under a lease to an undivided one-half interest in designated lands, which provided that the lessee, for a definite period, should enter upon the demised premises and work them in manner necessary to good and economical mining of coal; that, for the purpose of putting them in condition for such mining, work should commence on a specified date, and be prosecuted with reasonable diligence; lessee was required to pay a fixed royalty on each ton mined. The lease, also, provided that the lessee, as a further consideration for its execution, in case the lessor opened a store on the leased premises, should, upon terms and conditions similar to those existing in another contract to which reference was made, make stoppages on its pay rolls in his favor for all goods sold by him to the employees of the lessee, and that no privileges of a similar character should be extended to any other person, so long as the lessor continued to keep a store upon these lands. Appellee was the lessor, and from facts pleaded which are not controverted, appellant has become liable as lessee, and will be treated as such. It is averred in the complaint that the lands demised contain large and valuable deposits of merchantable coal, which can be worked and extracted at a profit by the reasonable expenditure of money; that under this lease, the lessee entered upon the premises, opened up a vein of coal, and has since held and retained possession, and by the exercise of reasonable diligence, and the expenditure of a reasonable amount of money, could have extracted and mined from these premises a thousand tons of coal per day; that it has failed to use reasonable diligence to put the premises in working order for the mining of coal, and to work them in manner necessary to

A covenant to work is not a covenant to work continuously. *Caley* v. *Portland*, 12 Colo. App. 397; 56 Pac. 350. *Jegon* v. *Vivian*, 8 M. R. 628.

good and economical mining, but, on the contrary, has ceased operations, and discontinued all efforts to prosecute mining on these lands, or to comply in any respect with the terms of the lease.

For answer appellant denied that the lands in question contained coal of a merchantable quality, or, that by the exercise of reasonable diligence or the expenditure of a reasonable amount of money, it could have extracted and mined coal from these lands at a profit; and for a first separate defense, averred that the terms and conditions of the lease relating to the privileges granted the lessor, as evidenced by the agreement mentioned in the lease, and set out *hæc verba* rendered the lease illegal and void, for the reason that it conferred upon appellee a monopoly in trading with the employees of the lessee; and for a second separate and distinct defense, averred that the lessor ought not to be allowed to maintain the action, because he was not the sole owner in fee of the premises described in the lease at the time of its execution, but only a tenant in common of an undivided one-half interest in the leased lands; and by way of cross-complaint, alleged that after due and diligent exploration, it had ascertained that the premises did not contain coal either in quality or quantity to justify working and operating for coal mining purposes, and that to carry on and prosecute such work on these premises would entail a net loss.

To the first and second separate defenses, a general demurrer was interposed by appellee, and sustained. On trial to the court of the issues made by the complaint, answer, and cross-complaint, the findings were for appellee, and judgment rendered dismissing the cross-complaint, and that appellee recover the sum of $3,850. The purport of the evidence, as bearing upon the issuable facts, will be found in the opinion.

JOHN M. WALDRON and D. C. BEAMAN, for appellant.

YEAMAN & GOVE and M. G. SAUNDERS, for appellee.

JUSTICE GABBERT delivered the opinion of the court.

The two principal questions for review, as presented by counsel for appellant, are:

First. Should the demurrer to the first and second separate defenses have been sustained?

Second. Did the court err in finding the issues, and rendering judgment in favor of appellee?

1. In support of the proposition that the demurrer to the first separate defense should not have been sustained, it is argued that the conditions of the lease which granted appellee special privileges in the way of trading with the employees of appellant, were illegal, because they conferred upon him a monopoly of the sale of merchandise to such employees, and are, therefore, against public policy, and that this illegality taints the entire lease, and renders it void. The contract mentioned in the lease is fully set out in this plea, but it is not deemed necessary to refer to its provisions. It is the general rule that if the consideration of a contract, or any part of it, is illegal, no promise based upon such illegal consideration can be enforced, but if there is a good and valid consideration for which another promises to do two things, one legal and the other illegal, the promissor is held to do that which is legal, unless the two are so intermingled they cannot be separated; *Pueblo & A. V. R. Co.* v. *Taylor,* 6 Colo. 1; 1 Parsons on Contracts, *457; or when the transaction is separated by the parties into two agreements, one legal and the other not, the former can be enforced and the transactions sustained *pro tanto. W. U. T. Co.* v. *B. & S. W. R. R. Co.,* 3 McCrary, 130, and note. The lease in express terms provided for the payment of a specified royalty, on each ton of coal mined. This was a good and valid consideration for the

execution of the lease, on behalf of the appellee. As a further consideration, it provides what special privileges should be granted him by the lessee in the event he engaged in keeping a store on the demised premises. This agreement is distinct and severable from that which relates to the payment of a fixed royalty. It amounted only to a promise by the lessee what it would do in the event the lessor engaged in the mercantile business on the leased premises. Whether the lessor kept a store or not, in no manner affected the royalty which lessee was to pay for the coal mined. The two promises on the part of lessee were distinct, and related to separate agreements. The penalty for the violation of each would be entirely different; the one can be sustained without sustaining the other, and, therefore, the agreement relating to the store, if void by reason of illegal conditions which it contemplated (a point upon which no opinion is expressed), is severable from that providing for the payment of a royalty, and in no manner affects the right of the appellee to a recovery in this action.

It is contended that no valid grant of the right to mine and extract coal was ever conferred upon appellant. This proposition, it is urged, is presented by the demurrer to the second special defense, for the reason that it appears from its averments that the lease in question only purports to convey a right to mine coal to an undivided one-half interest in the premises named, which is of no force or effect, because one tenant in common cannot grant such a right without the consent of his co-owners. The question sought to be raised by this defense, and argued, is, what right has a tenant in common to mine and extract coal from lands, or what liability does he incur in so doing, without the consent of his cotenants? This proposition is not presented. There is no question here between the lessee and the owners in the demised premises, not joining in the lease. The contract entered into on behalf of the lessor and lessee certainly bound each. It is not stated

in this defense, that the latter has been prevented from mining coal on the demised premises by those in whom the remaining title in fee is vested. The terms and conditions of the lease were in no manner contingent upon the lessee obtaining a lease from such co-owners. It has entered into an absolute contract, in so far as the terms of the lease under consideration are concerned; has received from the lessor the consideration for this engagement; its liability arises from its own direct undertaking, and it must, therefore, abide by its contract, or pay the damages resulting from a breach. *Superintendent, etc.* v. *Bennett,* 26 N. J. L. 513; s. c. 72 Am. Dec. 373; *Beebe* v. *Johnson,* 19 Wendell, 500; s. c. 32 Am. Dec. 518. The demurrer to these two special defenses was properly sustained.

2. The second question presented for determination necessitates a consideration and examination of the evidence. The testimony is voluminous, and to notice it in detail would be impracticable, and its review will, therefore, be limited to a mention of the particular facts to which it was directed, and what, in effect, the testimony of the respective parties was as bearing on these facts. The main questions of fact involved were, was there merchantable coal under the demised premises, and if so, was there reasonable diligence exercised on behalf of appellant in endeavoring to reach it? And next, was there sufficient evidence or data from which the court could determine the damages awarded, or that appellee was entitled to substantial damages on the case made? The lease in question was executed at a time when the lessee was engaged in extracting coal from the mines in the near vicinity of the leased premises, known as the Santa Clara. It was supposed that the same veins opened on the Santa Clara would be found on the lands described in the lease, but prospecting with a spring pole drill near or upon these lands failed to disclose a body of coal at the depth at which it should exist, as determined by the direction and dip of the coal measure disclosed

on the Santa Clara, in the openings known as the Walsen and Cameron. The discovery of a fault in the formation between these openings and the lands in question was supposed to account for the failure to find coal with the spring pole drill, as this fault would cause the vein on the leased premises to be at a greater depth than anticipated. Two explorations were then made with diamond drills, one hole having been bored near the south line of these lands, and the other not far distant from their east line. In the latter, which is designated drill hole No. 1, at a depth of about 285 feet, a vein six feet eight inches in thickness, with an intervening strata of three inches of slate, was discovered. In the former, though extended to a much greater depth (fully twice), no discovery of coal was made which could be said to correspond with this vein, nor was any discovery made which appeared to have any value. Subsequent to these explorations, a slope was commenced to the northeast of these premises, at a point about 2,925 feet from drill hole No. 1, and driven in the direction of these lands, and a vein of coal opened, and exposed for a distance of several hundred feet in this slope as extended. The thickness of this vein was a little over six feet. Taking into consideration the dip of the vein found in the slope, its elevation in this opening as compared with the elevation at the point where drill hole No. 1 was bored, the distance between these two points, and the depth of the vein as disclosed by this boring, in connection with the statement of several of the witnesses called on behalf of each party, that in their opinion the vein opened in the slope extended under the leased premises, there is certainly sufficient competent evidence to support the finding of fact on this subject by the trial judge, that it did; so that the next question to determine is, whether the evidence justified the finding that this vein was of merchantable quality.

On this subject the evidence is conflicting. Witnesses on behalf of appellant stated that, in their opinion, the coal from

the slope was not marketable; that the degree of impurities it contained and their distribution was such that the expense of separating them from the coal rendered its extraction impracticable as a mining enterprise; that the coal was of that character, even if properly cleaned, it was undesirable, and practically unmarketable, as it was neither a true coking, nor true domestic coal, it being located at that point in the southern coal fields, where the one class was in a state of transition to the other. On behalf of appellee witnesses stated that the coal in the slope was of the same general character as in the Walsen opening; that it was a good coal for steam and domestic purposes; did not contain impurities to the extent stated by witnesses for appellant, and improved in quality as the slope was extended. From the record it is understood that the vein in the Walsen opening and the slope is the same. It appears that the Santa Clara mines were operated for several years, and from the openings known as the Walsen and Cameron a great many thousand tons were mined and marketed; that coal from the slope and cross entries was mingled with those from the others, and sold; that after work on the slope ceased, the water was kept pumped out for over two years; that no offer to return or cancel the lease was ever made by appellant, until after the commencement of this suit; or that it ever notified appellee or claimed in conversation with him, that the coal was of an inferior or unmerchantable quality, the excuse for not working, when interrogated by appellee, being, that there was no market. With this conflict in competent evidence on the subject of the quality of the coal disclosed in the slope, the finding of the trial judge, that it was of a merchantable grade, cannot be disturbed on review. It was his province to determine this question from all the evidence in the case; judge of the credibility of the witnesses; take into consideration their knowledge and means of information on the subjects about which they testified; the acts of appellant; and from all the facts and circumstances sur-

rounding the transaction, determine this vital question regarding the quality of the coal in the slope; and the finding of fact in this respect being supported by competent evidence, this court cannot interfere by substituting its judgment for that of the trial court, upon the weight of the evidence in the case. *Wallace* v. *Giltinan,* 18 Colo. 473; *D. & R. G. Ry. Co.* v. *Hodgson,* 18 Colo. 117; *Aspen Times Co.* v. *Russell,* 18 Colo. 75; *Rust* v. *Strickland,* 21 Colo. 177.

The work of extending the slope was commenced in 1888, and continued for about two years, at which time it was suspended, and no further work of that character prosecuted. The period between the date this work ceased and the time this suit was commenced was nearly two years; the evidence was that by the prosecution of work with reasonable diligence, the leased lands could have been reached through the slope within eighteen months or two years from the date work on the slope was commenced, so that the finding of the trial court, that reasonable diligence had not been exercised by appellant in the prosecution of work for the purpose of reaching the coal on the demised premises, is supported by the evidence.

The trial court, in determining the damages awarded, appears to have adopted the rule that for violation of the covenants in the lease, no coal having been mined from the demised premises, the measure of damages would be the stipulated royalty on the number of tons which the lessee could have mined, by the exercise of reasonable diligence during the period covered by this action. This is the rule for which appellee contends, and we will assume, but not decide, it is correct for the purpose of determining the final question in the case, which relates to the damages awarded. The contention of counsel for appellant is, that at most, appellee was only entitled to nominal damages under the proofs made, and the disposition of this question necessitates a further review of the evidence and a construction of the covenant in

the lease upon the breach of which this action is based, which reads as follow: " * * * To enter upon said premises and work the same in a manner necessary to good and economical mining as a coal mine, with due regard to the preservation of the same as a workable mine; to take possession of the said premises on or before the fifteenth day of September, 1888, and to thereafter use reasonable diligence in putting said premises in working order for the mining of coal." The party seeking to recover substantial damages for breach of a contract must establish the facts which entitle him to such recovery. *Jones* v. *Nathrop,* 7 Colo. 1; *Patrick* v. *Colo. Smelting Co.,* 20 Colo. 268. In construing a contract, the first point to ascertain is, what the parties meant, understood, and intended, as determined by the words employed: 2 Parsons on Contracts, *494; *St. Louis Co.* v. *Tierney,* 5 Colo. 582; *Wolf* v. *Helbig,* 21 Colo. 490; and, as an aid in this respect, the situation of the parties, and the facts and circumstances surrounding the transaction at the time of the execution of the contract, as, also, its subject-matter and the object of the parties in making it, may be taken into consideration. *St. Louis Co.* v. *Tierney, supra.* The premises were demised expressly for coal mining purposes. They were not then, nor are they yet in shape to produce. Whether they could be successfully operated as a coal mine depended upon future development. By the transaction the lessor expected to receive compensation in the way of royalty, and the lessee profits from the operation of the leased premises as a coal mine; so that the benefits thus realized would be mutual. Unless coal was found of a merchantable grade which could be produced at a reasonable profit, or if that discovered was valueless, to require the lessee to mine it and pay royalty on the production would impose a burden without any benefits in return. The obligation was imposed upon the lessee to open the premises as a coal mine, and operate them as such, but in the absence of express provisions in the

lease rgarding what conditions should exist before a penalty would attach for a failure to observe this obligation, or under what circumstances it should comply with this provision, the law presumes that the parties to the lease, at the time of its execution, considered the purpose for which it was executed and the conditions under which it would be mutually beneficial to carry out its terms and provisions, and, therefore, intended by the language employed to contract accordingly. 2 Parsons on Contracts, *499. The right to mine having been granted, the law implies that the lessee should exercise reasonable diligence in working the mine: *Koch's Appeal,* 93 Pa. St. 434; but unless coal actually existed on the premises of a merchantable grade, which could be produced at a reasonable profit, or, if none existed, or that which was found was valueless, then, under this contract of lease, it would be under no such obligation. The court found that the degree of diligence required of the lessee to put the premises in working order had not been exercised; that a vein of merchantable coal existed on these lands, and that by the exercise of reasonable diligence, a certain tonnage could have been produced, but that was not sufficient upon which to base a judgment for substantial damages. The coal might be merchantable, and yet the lessee be unable to produce it at that profit, after deducting the stipulated royalty, which would be regarded as fair and reasonable for ventures of this kind, as determined from all the facts bearing on this subject. There was no attempt to prove that the coal could be mined, or the leased premises operated at such a profit, or if there was, the testimony which in any manner related to the subject was legally insufficient to establish this fact, and without it being established, there was not sufficient from which to deduce the conclusion that the lessee was under any obligation to mine the leased premises.

It was incumbent upon the lessor to establish every fact necessary to entitle him to a judgment for substantial dam-

ages, for the lessee would not be required to introduce any evidence to defeat a recovery for such damages, unless the lessor, at the close of his evidence, had established all the facts entitling him to such a judgment. Counsel for appellee appear to have fully recognized what was necessary to plead in order to state a cause of action, for in the complaint it was alleged that the lands demised contained deposits of merchantable coal which can be worked and extracted at a profit by the reasonable expenditure of money for that purpose; and there being no evidence to sustain the issue tendered by appellee on the question of profit, or the finding of the court in his favor on this subject, he was not entitled to a judgment for substantial damages.

The judgment of the district court is reversed, and the cause remanded for a new trial.

Reversed and remanded.

JAMES B. REAGAN ET AL. v. JOHN C. McKIBBEN ET AL.

(11 South Dakota 270. 76 N. W. 943. Supreme Court. October 18,

Practice on motion for new trial. Under Comp. Laws, § 5090, Subd. 4, providing that, when the motion for a new trial is made upon the minutes of the court, the specification of errors relied on must be made in the notice of intention, it is unnecessary that such specification be set out in the bill of exceptions.

A notice of intention to move for a new trial, which contains specifications of errors sufficient to call the attention of the trial court to the particular errors of law relied on, and which presents substantially all the questions discussed, is a sufficient statement thereof.

[1]**Sale reserving half interest in profits.** One who conveys his interest in a mining claim to another, in consideration of the latter taking charge of the property and paying him one-half the proceeds arising from working the mine, or a sale thereof, retains no equitable interest therein.

Such sale created no trust relation between the parties in the property itself.

[2]**Location of fraction by one co-owner.** On resurvey of a lode it was found to exceed the legal width: This left a vacant fraction. One

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[1]Covenant to work is good consideration for agreement to convey. *Clarno* v. *Grayson*, 30 Oreg. 111; 46 Pac. 426.

A failure to work the mine, etc., which was the consideration of the deed conveying an undivided interest does not constitute a failure of consideration. *Downing* v. *Rademacher*, (Cal.) 62 P. 1055.

[2]A cotenant cannot buy in a senior title and hold it against his cotenant. *Franklin Co.* v. *O'Brien*, 18 M. R. 331.

The conveyance of such title to a third party or corporation does not alter the case. *Id.*

Proceedings for patent by part of the co-owners does not stay a bill in equity to determine rights of the excluded co-owner and to have the applicant declared trustee for his benefit. *Malaby* v. *Rice*, 15 Colo. App. 364; 21 M. R. —.

A defrauded cotenant should resort to a court of equity. He cannot maintain ejectment not having the legal title. *Lockhart* v. *Johnson*, 181 U. S. 530.

As to the status of one owner relocating or patenting to the exclusion of other cotenants, see *Turner* v. *Sawyer*, 17 M. R. 683. *McCarthy* v. *Speed*, 19 M. R. 615.

of several interested parties located it in his own name. There was a question of fact as to whether at the time, it was done for the benefit of all: *Held*, that the facts of the case did not establish a trust or a breach of any proven contract.

Statute of frauds. An agreement to locate a mining claim for the benefit or in trust for others, if made prior to the location, is valid, although not in writing. Such an agreement or a declaration of trust, not in writing, after its location, cannot be enforced.

An offer to convey an interest in a mining claim to effect a compromise, is inadmissible to prove that the same was located in trust for others.

Conversations. Defendant not present. In an action to compel defendant to convey an interest in a mining claim, claimed to be located and held in trust for a partnership, conversations between two of the members thereof in defendant's absence, relative to its location, are inadmissible.

In such action, evidence that a third person was defendant's agent is properly excluded, where the declarations made by him to bind defendant, as agreeing to convey the same, were not in writing, nor authorized by defendant in writing.

Appeal from Circuit Court, Lawrence County; A. J. Plowman, Judge.

Action by James B. Reagan and another against John C. McKibben and another. From a judgment in favor of defendants and an order denying a motion for a new trial, plaintiffs appeal. Affirmed.

GRANVILLE G. BENNETT and J. B. MOORE, for appellants.

MCLAUGHLIN & MCLAUGHLIN, for respondents.

CORSON, P. J. This was an action on the equity side of the court to compel the defendants to convey to the plaintiffs an undivided one-half interest in a mining claim in Lawrence county, known as the "McKibben Fraction Lode," and for an injunction. The cause was tried by the court, and judgment entered in favor of the defendants. A motion for a new trial

was made and denied, and from the judgment and order denying a new trial the plaintiffs have appealed.

The respondents call the attention of the court to the fact that the errors of law complained of are not particularly specified in the bill of exceptions, and contend that they cannot be considered by this court on this appeal. As the motion for a new trial was made upon the minutes of the court, the specification of the particular errors relied on is required to be made in the notice of intention. Comp. Laws, § 5090, subd. 4. In the notice of intention the only specification of errors of law is, "excluding and admitting evidence upon the trial against plaintiffs' objections and exceptions, and which objections and exceptions were duly made and taken at the trial." This, standing alone, would clearly be insufficient as a statement of the particular errors of law relied on. But in other parts of the notice of intention there are more particular specifications of certain rulings of the court in excluding and striking out evidence, which were sufficient to call the attention of the trial court to the particular errors of law relied on, and which present substantially all the questions discussed by appellants' counsel in their brief.

The contention of the plaintiffs is that the defendant McKibben, in connection with the plaintiffs and one Danielson, was a co-owner of the Wasp lode and other claims adjoining, and that, upon a survey of the Wasp, it was found to be several feet too wide as staked, and consequently there was a fraction of unlocated ground, which was located by defendant McKibben under the name of "McKibben Fraction," in his individual name, but for the benefit of the Wasp Company, in which the plaintiffs had a one-half interest. The defendants meet this contention by two propositions: (1) McKibben was not an owner in the Wasp claim at the time he made the McKibben location, and had not been for several months prior thereto. (2) McKibben did not locate the McKibben claim for the benefit of any one but himself, and had never

agreed in writing to convey to the plaintiffs any interest therein. The appellants do not claim that McKibben ever agreed in writing to convey to them an interest in the McKibben location, or that he had declared any trust in their favor in writing.

The only question, therefore, for our consideration, is as to whether or not the facts and circumstances attending the location raise a trust in favor of the plaintiffs in the property, such as a court of equity can enforce, in the absence of any written agreement or declaration of trust in writing. The court found that McKibben, in January, 1895, sold his interest in the Wasp and adjoining claims to one Snyder for a good and valuable consideration. He further found that "in September, 1895, McKibben duly located the McKibben Fraction lode, for himself alone, and not in trust for the use and benefit of the said plaintiffs, or either of them, or any one else; that the location of the said McKibben Fraction lode was not made pursuant to any agreement or understanding between said plaintiffs and the defendant Edward Danielson, or any one else; that it was not located in the name of John C. McKibben, for himself and in trust for the owners of the Wasp lode and those interested therein, nor for their use and benefit, nor that either or all of said owners, to wit, James B. Reagan, Catherine Evans, Edward Danielson, and John C. McKibben, should each have an undivided one-quarter interest therein; that there was no agreement or understanding that the said John C. McKibben should or would upon demand, or in any other way, by good and sufficient deeds in writing, or in any other manner, convey to said plaintiffs any interest in the McKibben Fraction lode." The appellants contend that these findings are not supported by the evidence, and are against the weight of the evidence. The evidence as to these two findings will be first considered.

In cases tried by the court below without a jury this court is authorized to review the evidence when exceptions have been

duly taken (section 5237, Comp. Laws); but "it will only reverse the decision of the trial court when there is a clear preponderance of evidence against the decision of the court below." (*Randall* v. *Burke Tp.*, 4 S. D. 337, 57 N. W. 4.) The evidence that McKibben had no legal title to any part of the Wasp lode in September, 1895, when he made the location of the McKibben Fraction, is undisputed; but the appellants insist that he still had an equitable interest in that mining property, and that Snyder held the property in trust for him. It appears from the evidence in the record that, at the time McKibben conveyed his one-fourth interest in the Wasp and adjoining claims to Snyder, Snyder, as the consideration, agreed in writing to go to the Black Hills from Cedar Rapids, Iowa, and take charge of the property, and pay McKibben one-half of the proceeds arising from working the mines, and one-half of the amount received on a sale of the property. Under this agreement, we are of the opinion that McKibben retained no equitable interest in the property. In case Snyder failed to perform the contract on his part, the only remedy McKibben would have would be an action for breach of the contract. The conveyance to Snyder created no trust relation between the parties in the property itself, and the court, we think, very properly found that, at the time McKibben made his location, he had no interest in the mining claims as such.

We have examined the numerous authorities cited by the learned counsel for appellants, but they do not seem to us to sustain the theory contended for, where the property has been actually purchased by the grantee. Assuming therefore, without deciding, that, if the location of the fraction was made by McKibben while an equitable owner in the Wasp, he might have been held as trustee, it is clear that he could not be so held in this case, as he had no interest, legal or equitable, at the time the McKibben lode was located, in the Wasp location.

Appellants further contend that, if McKibben had no interest in the Wasp claim at the time he made the location of the fraction, he did in fact make the location for the benefit of the owners of the Wasp, and that the location was made in his name as a matter of convenience only. But the evidence does not sustain this theory. McKibben seems to have been the first to discover the existence of this fraction, and called the attention of Danielson, Snyder, and Reagan to the fact.

What then occurred is thus detailed by the four persons present: Mr. McKibben testifies: "I went up to the cabin. The Wasp Company was there,—Mr. Danielson and Mr. Reagan and Mr. Snyder. Mr. Evans had died before this time. I said, 'There is a fraction, and the Wasp ground is too large.' I told them Mr. Wilson had told me so. They told me to go locate it if I wanted it. They all spoke up." Mr. Reagan testifies he said: "We will locate that there. 'John' [addressing McKibben], you go and locate that, and I will dig the discovery." Mr. Danielson testifies: "I says, 'Go and locate that fraction.' I told McKibben to go and locate it. That is all I said. 'You go and locate that ground some of you. I got to go down to the smelter.' " Mr. Snyder testifies: "McKibben came in, and says: 'There is a fraction; Wilson found a fraction.' I told him to go and locate it, and Mr. Danielson told him the same. Not a thing, not a word was said about locating it for anybody or in trust for anybody." McKibben thereupon proceeded to post a notice upon the ground in his own name, which Reagan signed as a witness.

It will be observed that no witness testifies to any direction to McKibben to locate the ground for the company, or to any agreement on the part of McKibben that he would so locate it for the benefit of any one other than himself. McKibben subsequently caused the notice to be recorded. He also defined the boundaries of the claim by stakes. As to who sunk the discovery shaft, there is a conflict in the evidence.

McKibben seems to have located the place for it and did some work upon it. Reagan also did some work, and a laborer paid by McKibben did some. But little work appears to have been performed on the claim prior to July or August, 1896, when Reagan and Mrs. Evans claimed they were entitled to a one-half interest in the location. At that time this fraction was found to be valuable by reason of the shoot of ore discovered in the Wasp ground taking the direction of the fraction.

There was evidence received under objections, and subsequently stricken out by the court, tending to prove that McKibben, in person and through Snyder, offered to convey to Reagan and Mrs. Evans each one-eighth interest; but, as these offers were made in efforts to effect a compromise between the parties, the evidence was properly stricken out. The evidence was also inadmissible, and should have been excluded, it not being in writing, and objection being made upon that ground.

Eliminating from the case the evidence that was clearly inadmissible, we are of the opinion that the findings of the court below are fully sustained by a preponderance of the evidence. When it was found that the Wasp had been located in excess of 300 feet in width, and the surveyor reduced the claim to that width, the portion of the claim thus left outside of the new claim became vacant public land, subject to location by any qualified person. The owners of the Wasp had no claim to the fraction superior to any other person. They could have located it in the names of the owners of the Wasp, or they could have arranged with McKibben to locate it in his name for their benefit or in trust for them. Such an arrangement or agreement, made prior to the location, would have been valid, though not in writing. *Moritz* v. *Lavelle*, 77 Cal. 10, 18 Pac. 103; *Book* v. *Mining Co.*, 58 Fed. 106; *Moore* v. *Hammerstag*, 109 Cal. 122, 41 Pac. 805. But after the location was in fact made the claim became real property,

and no agreement to convey it, or any part of it, would be binding upon McKibben, unless evidenced by writing subscribed by him or his agent thereunto authorized in writing. Comp. Laws, § 3617; *Moore* v. *Hammerstag, supra; Belk* v. *Meagher,* 104 U. S. 279; *Forbes v. Gracey,* 94 U. S. 762; *Mining Co.* v. *Alexander,* 2 S. D. 557, 51 N. W. 346. A declaration of trust must also be in writing, and subscribed by the trustee or by his agent thereto authorized in writing. Comp. Laws, § 2795. No agreement on the part of McKibben, therefore, not in writing, to convey an interest in the Fraction lode, or declaration of trust not in writing, can be enforced against him, when objection is properly taken to the admission of the evidence on that ground. In this case objection was duly made, and the evidence, although admitted, was properly stricken out and disregarded by the court in making its findings of fact.

Taking the most favorable view of the case for plaintiffs, if there was any evidence of an agreement on the part of McKibben to make the location of the fraction for the benefit of the owners of the Wasp claim, it certainly did not preponderate in favor of the plaintiffs; and it is clear that after the location was made McKibben did not, by any instrument in writing, agree or bind himself to convey to the plaintiffs any interest in the location, or to hold it in trust for them or either of them. This court, therefore, would not be justified in reversing the judgment of the trial court upon the ground that the findings were not sustained by the weight of the evidence.

The appellants contend that the court erred in excluding all the evidence in relation to McKibben's offers to convey to plaintiffs an interest in the McKibben location, as such offers tended to prove an acknowledgment on the part of McKibben of the original agreement under which the fraction was located. But, if the offers were made in an effort to effect a compromise, they were inadmissible for any pur-

pose. We cannot agree with the contention of counsel that, had the evidence been admissible, it tended to prove what the original agreement was. All the agreement there was had been shown to the court by all the persons connected with the transaction. We discover no error in the ruling of the court in excluding this evidence.

The conversation between Reagan and Danielson, in McKibben's absence, was clearly inadmissible, and properly excluded.

The contention that the court erred in excluding the evidence of a conversation between Reagan and Snyder, in the presence of McKibben, is not tenable. It was an attempt to prove a verbal agreement on the part of Snyder that McKibben should convey to Reagan and Mrs. Evans an interest in the fraction. The agreement not being in writing, proof of it was inadmissible, over the objection of McKibben made upon that ground. The exclusion of evidence to prove that Snyder was the agent of McKibben was proper, as the evidence was clearly immaterial, as Snyder's agreement, if he made any under the authority of McKibben, would not bind him, not being in writing nor authorized by McKibben in writing. It is probably true that Reagan supposed that McKibben was locating the claim for the benefit of the Wasp Company, and his acts in assisting McKibben in sinking the discovery shaft indicate that he understood that McKibben was so making the location. But unfortunately no agreement to so locate it was made by McKibben at the time or prior to the location, and there is nothing in the case to indicate that McKibben had any intention of locating the claim for the benefit of any one other than himself. The fact is not to be overlooked that when the location of this small fraction, seven feet in width by several hundred feet in length was made, it had no appreciable value, and it is not surprising that but little attention was paid to the matter of this location at the time it was made.

It is clear that, under the facts disclosed by the record, the plaintiffs were not entitled to findings and judgment in their favor. They failed to show any agreement on the part of McKibben to locate the claim for the benefit of the owners of the Wasp lode, or for the benefit of any person other than himself. They failed to show any valid declaration of trust on the part of McKibben in favor of the owners of the Wasp or any other person. They failed to show any valid agreement on the part of McKibben to convey any interest in said location to the plaintiffs or to either of them. There was no involuntary trust, trust by operation of law, or resulting trust. It follows from these conclusions that the findings and judgment of the circuit court are correct, and the judgment and order denying a new trial are affirmed.

MANUFACTURERS' NATURAL GAS CO. OF INDIANAPOLIS, INDIANA v. MARY LESLIE ET AL.

(22 Indiana App. 677; 51 N. E. 510. Appellate Court of Indiana. October 27, 1898.)

[1]**Measure of damages for pipe line.** In a proceeding, under the act of February 20, 1889, for the appropriation of an easement in lands for the purpose of laying natural gas mains, the measure of damages is the actual value of the land appropriated, and any injury to the residue.

Possible injury to future crops. Where an easement in land is appropriated for the laying of natural gas mains, damages cannot be allowed for possible injury to crops from leakage or for injuries to persons and property likely to result from explosions.

Idem. In the absence of evidence that a natural gas main will prevent the future improvement of land, damages cannot be allowed therefor in proceedings to appropriate an easement for its construction.

Interrogatories not objected to. Appellant, who at the trial did not object to the submission of special interrogatories to the jury, cannot on appeal complain that such interrogatories were not authorized by statute.

Appeal from Superior Court, Madison County; William S. Diven, Judge.

[1]As to when condemnation proceedings lie in aid of mining, see *Byrnes* v. *Douglass*, 19 M. R. 96.

Measure of damages against railroad conducting its way over quarry ground. *Reading R. Co.* v. *Balthaser*, 126 Pa. 1; 17 Atl. 518.

Measure of damages for pipe line. *McGregor* v. *Equitable Gas Co.* 139 Pa. 230; 21 Atl. 13.

Value of stone quarry, how proved. *Burlington R. R.* v. *White*, 28 Neb. 166; 44 N. W. 95.

Special injury to mine considered in estimating damages. *Chicago R. Co.* v. *McGrew*, 104 Mo. 282; 15 S. W. 931.

A jury cannot consider probability of future explosions in condemnation case for gas. *Indiana Co.* v. *Jones*, 14 Ind. App. 55; 42 N. E. 487.

Consideration of the question of comparative inconvenience; case between railroad and mine. *Kansas & T. Ry.* v. *Northwestern Coal Co.* 161 Mo. 288; 61 S. W. 684.

By statute land may be condemned in Utah for tramway purposes. *U. S.* v. *Marshall*, 122 Fed. 428.

Proceedings by the Manufacturers' Natural Gas Company of Indianapolis against Mary Leslie and others to appropriate an easement in lands for the purpose of laying natural gas mains. From an award of damages, the plaintiff appeals. Reversed.

M. A. CHIPMAN, S. M. KELTNER and E. E. HENDEE, for appellant.

A. C. CARVER, GUY BALLARD, F. E. GAVIN, T. P. DAVIS and J. L. GAVIN, for appellees.

WILEY, J. This case was transferred from the supreme court after a judgment of affirmance had been rendered in that court, and a rehearing granted. 49 N. E. 946. It was a proceeding to appropriate an easement in lands for the purpose of laying natural gas mains, under the provisions of the act of 1889. (Acts 1889, p. 22; § 5103, Burns, 1894, and succeeding sections.)

In the case before us there was a disagreement between appellant and appellees as to the appropriation of certain of appellees' lands for such easement, and they were unable to agree among themselves as to what compensation appellant should pay. Thereupon appraisers were duly appointed, as provided by law, who assessed damages at $250. So far as the record shows, all the steps required by statute appear to have been regular, and, on the filing of the report of the appraisers, appellant paid to the clerk of the court the amount assessed for the use and benefit of appellees. To this report appellees filed exceptions, and appealed to the court below, where the question of damages was submitted to a jury, and the amount assessed by their general verdict was $550. At the proper time, appellant requested the court to submit to the jury certain interrogatories, and require them to be answered in case the jury agreed upon a general verdict.

By their answers to interrogatories, the jury specified the different items of damages, and these several items aggregate the amount named in the general verdict, so, as between the general verdict and the answers to the interrogatories, there is no inconsistency in the amounts. It is earnestly insisted, however, by appellant, that certain items or elements of damages found and specified by the jury in answer to the interrogatories are improper, and do not constitute damages for which it is liable in this proceeding. The several items of damages as specifically found by the jury are as follows: (1) Value of real estate condemned, $200; (2) interfering with the cultivation of the soil, $50; (3) leakage of gas, permeating the soil and entering tile ditches, causing explosions and loss of crops, $100; (4) explosion of gas, causing damages to persons and stock, $50; (5) barring and interfering with improvement of certain parts of the land, $75; (6) relation of the balance of the land to the part condemned, $75,—making a total of $550.

Upon the return of the verdict and answers to interrogatories, appellant moved for judgment in its favor on the answers to interrogatories, notwithstanding the general verdict; also moved the court to render judgment for appellees for $250 and $275, respectively,—each of which motions was overruled, and appellees' motion for judgment for $550 was sustained. Appellant then moved that the judgment be modified so as to be for $250 and $275, respectively, and no more, which motions were each overruled. All these motions are properly reserved and brought into the record by a bill of exceptions. The rulings on these several motions are assigned as errors, and, as they substantially present the same question, they may be considered together. It is specially urged that the items of $100 for leakage of gas, causing explosions and loss of crops, and $50 for explosion, causing damage to persons and stock, are not proper ele-

ments or items of damages, and are erroneously included in the judgment.

The statute under which this proceeding was brought is not as clear and definite as to the question of damages as it might be; yet we think it can be fairly construed so as to carry out the intention of the legislature in passing it. It provides, where the parties cannot agree, that an appraisement of the damages, etc., shall be made; and, as to the measure of damages, it is provided that "they [the appraisers] shall consider the injury which such owner may sustain by reason of such trenches and pipe lines, and shall forthwith return their assessment of damages to the clerk of such court, setting forth the value of the property taken, or injury done to the property, which they shall assess to the owner or owners separately." This statute is evidently intended to serve the same purpose, for the condemnation of lands, or to appropriate an easement therein, for the laying of pipe lines, etc., as the general statute relating to condemnation proceedings in securing the right of way for the construction of railroads. There is this difference, however: In a condemnation proceeding to procure a right of way for a construction of a railroad, the title to such right of way vests in the company; while, in a proceeding of this character, the company only acquires an easement. The object, therefore, of the legislature in passing the act we are now considering, was to provide landowners a just and adequate compensation for damages incident to the construction of pipe lines, etc., over and across their lands. Such compensation must be measured by the actual damages to the freehold, occasioned by such construction, including the land appropriated and occupied, and the relation of the remaining land thereto.

It is evident that it was not the intention of the legislature to embrace within the statute damages on account of

injuries, either to persons or property, that subsequently might occur on account of negligence, etc. Such negligence, resulting in injury either to persons or property, might create an independent right of action, but it could not be made a basis for estimating the damages to the freehold, growing out of the construction of such pipe line.

The rule for the assessment of damages in condemnation proceedings for railway purposes is the value of the land actually taken, and any injury to the residue. *Indiana R. Co.* v. *Allen,* 100 Ind 409; *Whitewater Val. R. Co.* v. *McClure,* 29 Ind. 536; *Montgomery Gravel-Road Co.* v. *Stockton,* 43 Ind. 328; *Baltimore R. Co.* v. *Lansing,* 52 Ind. 229. In *Roushlange* v. *Railway Co.,* 115 Ind. 106, 17 N. E. 198, Zollars, J., stated the rule as follows: "The rule as to what damages may be assessed by the commissioners in a condemnation proceeding is that the value of the land appropriated should be considered, together with any injury to the residue of the land naturally resulting, or that might reasonably be expected to result, from the appropriation and construction of the road in a proper and lawful manner." And in the same case it was further said: "Such assessment of damages will not be presumed to cover damages resulting from the negligent construction of the road, or any portion of it, nor damages resulting from improper encroachments upon land outside of the right of way."

In the case last cited, the right of way was conveyed by deed to the railway company; and, after the road had been constructed, it was found that, at a certain point on such right of way, the ground was soft, and the roadbend sank. In filling up the depression, appellee encroached upon land outside of the original right of way, and the owner brought his action for damages. In discussing the question, the court said: "Had the strip of land been taken by condemnation, instead of by grant, the commissioners or jury, in

assessing the damages, could not have included damages for such encroachment—First. Because they could not have assumed that the railroad company would voluntarily so construct its road as to make it rest partially upon land outside the right of way. To have assumed that, and to have assessed damages accordingly, would have been to assume that the railway company would commit a trespass, and have assessed in advance damages resulting from such trespass. Second. Because they could not have known in advance that the result of the fill would be to cause the embankment so to spread as to encroach upon the appellant's land, and cause injury. Such an injury could not reasonably have been expected to result from the proper construction of the road."

The case of *Indiana N. G. Co.* v. *Jones,* 14 Ind. App. 55, 42 N. E. 487, is in point. It was there held, and we think correctly, that it will not be presumed, in the absence of evidence, that natural gas cannot be conducted through pipes without injury to the premises through which it passes. And in the same case it was further held that damages will not be allowed for probable future losses by fire and explosions, as independent items, disconnected from the diminished value of the land, in proceedings to condemn the same for laying pipes to convey natural gas. The questions there discussed and decided arose in condemnation proceedings, and upon an instruction to the jury. In the instruction, the court told the jury that, in considering the damages to be assessed, they could take into consideration the probability of injuries from fire and explosions which might result from the ordinary, prudent, and careful operation of the pipe line. And, in another instruction, the court told the jury that they could include, not only damages for the injuries to the land resulting from putting in the pipe line, but also damages which would probably result from the careful and reasonably prudent maintenance of the same in the future.

Both of these instructions were held to be erroneous, as not stating the correct rule as to the measure of damages in such proceedings.

The jury found in the case before us that appellees were entitled to recover damages for leakage of gas and the bursting of pipes, resulting in injury to crops in the sum of $100, and $50 damages for explosions, to the injury of persons. Under the authorities, these items of damages were not recoverable in this action, and it was reversible error to render judgment for them. Another item of damages as found by the jury is as follows: "Barring improvements on certain portion of land, $75." As to whether this is an element of damages proper to be considered in this proceeding, we are not able to decide from the record. We hold, however, that, under the record as it comes to us, it was improper for the jury to consider it. The evidence is not brought into the record, and whether there was any evidence upon which such damages could be predicated, we are unable to say. If the jury meant to say that at some future time the appellees might desire to build a house or some other structure on the land traversed by appellant's pipe line, and that such line would interfere therewith, then, in that event, it would be too remote and indefinite to form the basis of the damages specified in the last above mentioned item.

The statute under which these proceedings were had provides that "said trenches and pipe lines in all cases to be laid at such depth as not to interfere with the tillage of the soil, or the existing drainage, and the soil taken from such trenches shall be returned with the top soil on top, as originally found." (Subd. 4, § 5103, Burns 1894.) The same statute also provides that such trenches shall be constructed in such manner as to afford security to life or property. We must presume that appellant, in constructing its pipe line, did so in conformity to the law; and hence, in filling the trench, it placed the top soil on top, so as not to interfere

with the cultivation of the soil or the use of the freehold, and also constructed its pipes in such a manner as to afford security to life and property. If this is true, then, when appellant had fully completed its line and filled the trenches, such line would not interfere with appellees' cultivation, use, and occupancy of the freehold, or prevent them from constructing buildings on any part thereof. The highest duty of a court is to see that justice is meted out, and that the rights of litigants are fully protected. In this case this could not be done by an affirmance of the judgment, for we would thus be holding that appellees could recover certain elements of damages which the statute does not authorize, which justice does not tolerate and which this court has specifically decided are not recoverable.

It is insisted by counsel for appellees that, when this action was tried in the court below, there was no statute authorizing the court to submit to a jury interrogatories, and require them to find specially upon particular questions of fact. As to whether there was such authority or not, we do not decide, for the objection comes too late. At the trial of this cause, counsel for appellees recognized the right to have interrogatories submitted to the jury upon particular questions of fact, by not objecting thereto, and therefore appellees cannot now be heard to complain. As we have shown in this opinion, the elements of damages that may be recovered in such proceedings are clearly and distinctly marked. Neither courts nor juries can speculate upon the question, for the damages accruing to the freehold are susceptible of direct and positive proof, and hence may be determined to almost mathematical precision.

It is seldom that a case comes to this court where the record presents such a wanton disregard of the legal rights of a litigant as shown by the jury in this case, in their answers to interrogatories. If the principle contended for here by appellees should prevail and become fixed in our jurispru-

dence, there would be no protection to the rights of those invoking the wholesome doctrine of eminent domain, where the right involved the duty of submitting the question to the arbitrament of a jury. We could, on the answers to the interrogatories, direct a judgment; but, looking at the entire record, we believe the ends of justice will be best subserved by a new trial of all the issues.

The judgment is therefore reversed, and a new trial directed.

[1]ST. LOUIS MINING & MILLING CO. v. MONTANA MINING CO.

(171 U. S. 650; 19 Sup. Ct. 61. Supreme Court. October 31, 1898.)

[2]**Executory contract to patent and convey after patent.** Neither the statute nor public policy renders invalid a contract made in settlement of litigation over a disputed boundary between mining claims, by which one of the claimants binds himself, on obtaining title from the United States, to convey the portion in dispute to the other.

Estate of mining locator. Where there is a valid location of a mining claim the area becomes segregated from the public domain and the property of the locator with full power to alienate or encumber.

In Error to the Supreme Court of the State of Montana.

This was a suit for specific performance, brought by the Montana Mining Company against the St. Louis Mining & Milling Company of Montana and Charles Mayger in the district court of the first judicial district of the state of Montana, in and for the county of Lewis and Clarke.

The complaint alleged that: On March 7, A. D. 1884, plaintiff's predecessors in interest, Robinson, Huggins, Sterling, De Camp and Eddy, were the owners of, and in possession, and legally entitled to the use, occupation, and possession, of a certain portion of the Nine Hour Lode and Mining Claim, which embraced in all an area of 12,844.5 feet, together with the minerals therein contained.

[1]S. C. below, 19 M. R. 218.

[2]Contract to enter and convey, under the pre-emption and homestead acts, is void and contract founded on assignment of such agreement is without consideration. *Brown* v. *Kennedy*, 12 Colo. 235; 20 Pac. 696.

A patent for coal lands obtained by entries made by use of names of nominal parties for benefit of a corporation should be set aside. *U. S.* v. *Trinidad C. Co.* 137 U. S. 160.

Agreement to patent and reconvey to avoid adverse upheld, and the obligor not allowed to pay the penalty and refuse to convey. *Mining Co.* v. *Peoples Co.* 28 Colo. 251; 64 Pac. 218.

That Mayger applied to the United States land office at Helena for a patent to the St. Louis lode mining claim, owned by him, and that in the survey he caused to be made of his claim he included that part of the Nine Hour lode mining claim described in the complaint, whereupon an action was commenced by Robinson and Huggins against Mayger in the district court of the third judicial district of the then territory of Montana to determine the right to the possession of the particular premises. That on said 7th of March, for the purpose of settling and compromising that action, and settling and agreeing upon the boundary lines between the Nine Hour lode mining claim and the St. Louis lode mining claim, Mayger made, executed, and delivered to Robinson, Huggins, and Sterling a certain bond for a deed, whereby, in consideration of the compromise and settlement of the action and the withdrawal of the protest and adverse claim, he covenanted and agreed that when he should obtain a patent as applied for, he would, on demand, make, execute, and deliver to Robinson, Huggins, and Sterling, or their assigns, a good and sufficient deed for the premises described in the complaint; and thereupon Robinson, Huggins, and Sterling dismissed their said action, withdrew their adverse claim, and performed all the conditions of the bond on their part.

That Mayger then proceded with his application, and obtained a patent, but that he gave no notice to plaintiff, or any of its predecessors in interest, of the obtaining of the patent, until some time in November, 1889.

That when the bond for a deed was executed plaintiff's predecessors in interest were in possession of the premises, and have ever since been and are yet in possession thereof, holding and using the same as a part of the Nine Hour lode claim. That by mesne conveyances the title to this claim, including the portion in dispute in this suit, had come to plaintiff. That it is entitled to a conveyance of the premises from Mayger. That Mayger, on or about June 10, 1893,

assumed to convey said piece of ground to the St. Louis Mining & Milling Company, which then had full knowledge and notice of the making, execution, and delivery of the bond for a deed by Mayger, and of the rights and equities of the Montana Mining Company thereunder. That the St. Louis Company has instituted a number of suits in the circuit court of the United States, in which it claims that it is the owner of the premises described in the complaint, and also the right to recover certain sums of money for ores alleged to have been wrongfully extracted therefrom. The bond referred to was appended to the complaint. The prayer was that the court should decree that defendants should convey to plaintiff a good and sufficient deed to the premises in controversy.

The answer denied all the material allegations of the complaint, and affirmatively alleged that the adverse claim interposed to the application of Mayger for a patent was for the purpose of harassing and hindering Mayger in obtaining a patent to his mining claim, and that the bond was given contrary to equity, good conscience, and public policy.

The case was tried by the district court without a jury, and the court made and filed findings of fact and conclusions of law. It was found that plaintiff's predecessors in interest were at the time mentioned in the complaint the owners of, in possession and entitled to the possession of, the Nine Hour lode mining claim as described, and that the strip of ground in dispute was at the time, and continued to be, a part of said claim; that the bond was executed and delivered by Mayger to the parties therein named, binding Mayger to convey to them or their assigns the ground in question when Mayger obtained a patent therefor; that it was given as a compromise and settlement of the controversy as to the land now in dispute, and then in litigation between the parties, and for the purpose of fixing and determining the boundary line between the Nine Hour lode mining claim and

the St. Louis mining claim, as alleged in the complaint, and that Mayger thereafterwards did obtain a patent covering the premises in dispute; that plaintiffs in the adverse mining suit, on the execution to them of the bond by Mayger, dismissed their action, and performed all the conditions of the contract on their part; that at the time of the execution of the bond the predecessors of plaintiff were in actual possession of the ground in dispute, and that they and plaintiff have ever since remained in possession thereof, claiming and holding the same as a part of the Nine Hour lode mining claim; that at the date of the execution and delivery of the bond it was expressly agreed between the parties thereto that all the ground lying to the east of the westerly line of the strip should be a portion of the Nine Hour lode mining claim; that plaintiff is the successor in interest of Robinson, Huggins, and Sterling, the obligees named in the bond, and also of De Camp and Eddy, who were cotenants with said obligees in the premises at the date of the execution of the bond; that the mesne conveyances introduced in evidence on the part of plaintiff embraced, and were intended to include, the ground in question, and conveyed to the grantees therein named all of the interest, legal and equitable, which the grantor or grantors had in said premises, covering as well their interest in the ground in dispute as in every other part and parcel of the Nine Hour lode mining claim; that in July, 1893, plaintiff duly demanded a deed to the ground in dispute from defendants, which defendants refused to execute; that in June, 1893, Mayger assumed to convey the controverted ground to the St. Louis Mining & Milling Company, but that at the date of his conveyance the St. Louis Company had full notice and knowledge of plaintiff's equities in and to the disputed strip, and of its possession thereof; that defendants wrongfully asserted title to the ground in controversy, and thereby clouded plaintiff's title thereto, which cloud plaintiff had a right to have removed.

The district court concluded as matter of law that plaintiff was entitled to the conveyance prayed for, and that defendants should be enjoined from asserting any right, title, or interest in or to the ground in dispute, and from in any manner interfering with the possession or enjoyment thereof by plaintiff.

In accordance with the findings of fact and conclusions of law, a decree was entered for plaintiff, and defendants appealed to the supreme court of the state of Montana, by which it was affirmed. 51 Pac. 824.

This writ of error was then sued out, and defendant in error now moves to dismiss the writ, or that the decree be affirmed.

A. B. BROWNE on behalf of CHAS J. HUGHES, JR., and W. E. CULLEN, submitted their brief in support of the motion.

W. W. DIXON, THOMAS C. BACH, and EDWIN W. TOOLE, opposing.

Mr. Chief Justice FULLER, after stating the case, delivered the opinion of the court.

While it is conceded by plaintiffs in error that there is no express prohibition on the transaction involved in the record, it is contended that the contract was contrary to the policy of the law, and that the question thus raised is necessarily a federal question. Granting that this is so, and that the motion to dismiss must, therefore, be overruled, we are of opinion that there was color for the motion, and that the case may properly be disposed of on the motion to affirm.

The supreme court of Montana ruled that, in the absence of statutory prohibition, there was no reason in law or equity why the contract sought to be enforced should be held illegal, and we concur in this disposition of the federal question suggested.

The public policy of the government is to be found in

the constitution and the laws and the course of administration and decision. *License Tax Cases,* 5 Wall. 462; *U. S.* v. *Trans Missouri Freight Ass'n,* 166 U. S. 290, 340, 17 Sup. Ct. 540.

The proposition of plaintiffs in error is that, where an application to enter a mining claim is made, and there is embraced therein land claimed by another, it is the duty of the latter to file an adverse claim, and thereafter bring in some court of competent jurisdiction an action to determine the right to the area in conflict, which action must be prosecuted to a final judgment or dismissed; and that no valid settlement can be made by which such adverse claimant can acquire any interest in the ground when thereafter patented by the applicant. We are not aware of any public policy of the government which sustains this proposition.

Where there is a valid location of a mining claim, the area becomes segregated from the public domain and the property of the locator. There is no inhibition in the mineral lands act against alienation, and he may sell it, mortgage it, or part with the whole or any portion of it, as he may see fit. *Forbes* v. *Gracey,* 94 U. S. 762, 766; *Manuel* v. *Wulff,* 152 U. S. 505, 510, 14 Sup. Ct. 651; *Black* v. *Elkhorn Mining Co.,* 163 U. S. 445, 449, 16 Sup. Ct. 1101.

The location of the Nine Hour lode was in all respects sufficient and valid. When the dispute afterwards arose between Robinson and Mayger as to a portion of it, there was nothing to compel the filing of an adverse claim. The settlement made gave Robinson an equitable title immediately, and ultimately he was to have the complete legal title, to a piece of ground, which it seems rightfully belonged to him. The government was not defrauded in any way, nor was there any legal or moral fraud involved in the transaction. The settlement and adjustment of the dispute with reference to the right of possession appears upon its face to have been satisfactory to the parties when made, and should be upheld

unless contravening some statute or some fundamental principle of law recognized as the basis of public policy. There was no such statute, and settlements of matters in litigation or in dispute without recourse to litigation are generally favored, and are apparently of frequent occurrence in regard to mining land claims; nor is there anything in the decisions of this court to throw doubt on their validity.

In *Ducie* v. *Ford,* 138 U. S. 587, 11 Sup. Ct. 417, a contract of the character of that under consideration was passed on in a suit brought to enforce its specific performance, and it was assumed that the contract was not void as in contravention of any statute of the United States, or contrary to public policy. In *Meyers* v. *Croft,* 13 Wall. 291, this court was asked to hold that the prohibition against alienation found in the last clause of the twelfth section of the pre-emption act of 1841 extended from the date of entry to the actual issue of patent. This the court declined to do, and decided that the object of the act was attained when the pre-emptor went with clean hands to the land office, and proved up and paid for his land. And the court said: "Restrictions upon the power of alienation after this would injure the pre-emptor and would serve no important purpose of public policy. It is well known that patents do not issue in the usual course of business in the general land office until several years after the certificate of entry is given, and equally well known that nearly all the valuable lands in the new states admitted since 1841 have been taken up under the pre-emption laws, and the right to sell them freely exercised after the claim was proved up, the land paid for, and the certificate of entry received. In view of these facts, we cannot suppose, in the absence of an express declaration to that effect, that congress intended to tie up these lands in the hands of the original owners until the government should choose to issue the patent."

In *Davenport* v. *Lamb,* 13 Wall. 418, a covenant made by

certain grantors "that, if they obtain the fee simple to said property from the government of the United States they would convey the same to the grantee, his heirs or assigns, by deed of general warranty," made with reference to a tract of land taken up under what was known as the Oregon Donation Act, was upheld, although the point that the covenant was against public policy was distinctly made.

In *Lamb* v. *Davenport,* 18 Wall. 307, 314, Mr. Justice Miller, speaking of claims under that act, said: "They were the subjects of bargain and sale, and, as among the parties to such contracts, they were valid. The right of the United States to dispose of their own property is undisputed, and to make rules by which the lands of the government may be sold or given away is acknowledged; but, subject to these well-known principles, parties in possession of the soil might make valid contracts, even concerning the title, predicated upon the hypothesis that they might thereafter lawfully acquire the title, except in cases where congress has imposed restrictions on such contracts."

And to the same effect see *Gaines* v. *Molen,* 30 Fed. 27, where the subject was considered by Mr. Justice Brewer, then circuit judge.

Anderson v. *Carkins,* 135 U. S. 483, 487, 10 Sup. Ct. 905, involved a contract made by a homesteader to convey a portion of a tract when he should acquire title thereto from the United States, and was disposed of on different grounds. It was stated in the opinion that: "The theory of the homestead law is that the homestead shall be for the exclusive benefit of the homesteader. Section 2290 of the Revised Statutes provides that a person applying for the entry of a homestead claim shall make affidavit that, among other things, 'such application is made for his exclusive use and benefit, and that his entry is made for the purpose of actual settlement and cultivation, and not, either directly or indirectly, for the use or benefit of any other person.' And section 2291,

which prescribes the time and manner of final proof, requires that the applicant make 'affidavit that no part of such land has been alienated, except as provided in section twenty-two hundred and eighty-eight,' which section provides for alienation for 'church, cemetery or school purposes, or for the right of way of railroads.' The law contemplates five years' continuous occupation by the homesteader, with no alienation except for the named purposes. It is true that the sections contain no express prohibition of alienation, and no forfeiture in case of alienation; yet under them the homestead right cannot be perfected in case of alienation, or contract for alienation, without perjury by the homesteader. * * * There can be no question that this contract contemplated perjury on the part of Anderson, and was designed to thwart the policy of the government in the homestead laws, to secure for the benefit of the homesteader the exclusive benefit of his homestead right."

In the case at bar there was no statute which, in express terms, or by any fair implication, forbade the making of such a contract as that proceeded on here

Decree affirmed.

LOUISA AHRNS ET AL. v. THE CHARTIERS VALLEY GAS CO.

(188 Pennsylvania 249; 41 Atl. 739. Supreme Court. October 31, 1898.)

[1]**Silent acquiescence in disuse no bar to recovery of rental.** An oil and gas lease for a term of twenty years stipulated that the lessee should drill at least two wells on the premises; it also provided that a failure by the lessee to pay the rental specified at the times stated should render the lease null and void. The lessee drilled one well, but never drilled the second one. The gas from the first well was utilized and paid for more than two years, when the well was plugged, the casing pulled and the rig taken down. The lessee did not surrender or offer to surrender the written lease or place upon record any paper showing that the recorded lease had been surrendered. Ten years after the last payment of rental the lessor brought an action of assumpsit for rentals under the lease. *Held*, (1) that the lessee had no right to abandon the leasehold even if the first well had proved a total failure, as it had expressly contracted to test the farm by drilling two wells; (2) that there was no evidence in the case that the lessor knew or ought to have known that the lessee ever intended to abandon and surrender its rights under the lease.

The statute of limitations has no application the action being upon a sealed instrument.

[2]**Failure to deny execution of lease.** A defendant is estopped from asserting, in the common pleas, that the lease sued on was not duly

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[1]Oil lease at $75 in advance with right to quit. Lessee gave notice on first day of second year: *Held*, he was liable for that year's rent. *Nesbit* v. *Godfrey*, 155 Pa. 251; 25 Atl. 621.

Lessee held for royalty through lessor's covenants not performed, such covenants being construed as independent covenants. *Central Co.* v. *Buchanan*, 73 Fed. 1006.

Lessee agreed to pay $7,500 each year, being royalty on 75,000 tons of coal, mined or not mined. After nine years' complaisance by the lessor and supposed abandonment by the lessee, judgment was allowed for the full amount with interest and the statute of limitations denied to the defendant for want of plea. *Martin* v. *Berwind-White C. M. Co.* 114 Fed. 553; Aff'd. 124 Fed. 313; 22 M. R. —.

[2]A written lease signed by the lessor and accepted by the lessee is binding though not signed by the lessee. *Doxey's Estate* v. *Service*, (Ind. App.) 65 N. E. 757.

executed, where a copy of the lease is filed on or before the return day of the writ, unless the execution is denied by affidavit filed with or before the plea entered by defendant, as provided by section 5 of rule 3 of the court of common pleas.

Estoppel against lessee. The taking possession of the lessor's property by the lessee company, under an oil lease, and drilling a well from which gas was obtained and paid for, and afterwards executing a written agreement referring to the leasehold created by the lease as its property, estops the lessee from denying its execution of the lease.

Appeal from Court of Common Pleas, Washington County; McIlvaine, Judge.

Action by Louisa Ahrns and others against the Chartiers Valley Gas Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

Assumpsit upon an oil lease.

The facts appear by the opinion of the trial court disposing of the reserved points.

At the trial the court directed a verdict for plaintiffs, reserving the following points presented by the defendant:

1. The act of March 27, 1713, known as the Statute of Limitations, is a bar to the recovery by the plaintiffs of more of their claim than for the six years immediately preceding the bringing of their action.

2. The failure of the plaintiffs to bring an action for the recovery of their supposed claim, or of any part of it, against the defendant prior to March 27, 1897, is indicative of their acquiescence in the apparent purpose of the company to regard the lease in evidence as not binding upon either of the parties thereto.

3. The first installment of rent for delay in completing the second well contracted for in the lease between the par-

ties to this action, having become due and payable on November 7, 1887, and no action having been brought by the plaintiffs to recover said installment until March 27, 1897, such delay was unreasonable, and the plaintiffs cannot recover either the installment just referred to or any other installment of rent under said lease claimed to be recoverable in the present action.

4. The forfeiture clause in the lease having been inserted therein for the benefit of the lessors, it was their duty to promptly exercise their right to declare the lease forfeited for non-compliance by the defendant with its covenants, or to manifest their intention to require the defendant to comply with the covenants in the lease relative to the stipulated payments to be made for delay in the completion of the second well; and the failure of the plaintiffs to attempt to exercise their right of election until March 27, 1897, when this action was brought by them, was not an exercise of their right of election within a reasonable time, and they cannot recover.

4½. That the lease offered in evidence by the plaintiffs shows on its face that it is not the deed of the Chartiers Valley Gas Company, is not signed by that company as it was averred to have been signed both in the original statement and in the amended statement, and it is not a basis upon which the plaintiffs can ask for a recovery in this case under their statement.

5. Upon the evidence and the law applicable to it, the verdict of the jury must be for the defendant.

Verdict for plaintiffs for $10,133.64.

The opinion of McIlvaine, P. J. upon the questions of law reserved was as follows:

From the lease offered in evidence at the trial, the following extracts are relevant to the motion now before us. "This lease, made this seventh day of August, A. D. 1885, by and between Louisa Ahrns, George Ahrns, Henry Ahrns,

and Lewis Ahrns, of the county of Washington, and state of Pennsylvania, of the first part, and the Chartiers Valley Gas Company, of the second part. * * * To have and to hold the said premises, for the said purpose only [the purpose being 'of drilling and operating for petroleum oil or gas'], unto the party of the second part, its executors, administrators, and assigns, for, during, and until the full term of twenty years next ensuing the day and year above written. * * *

"It is further agreed that party of second part shall drill on said premises at least two wells. * * * Well No. 1 to be completed within one year of the date of this lease, and well No. 2 within two years of the date of this lease. * * *

"Well No. 2 shall be completed within two years of the date of this lease, and, if sufficient quantity of gas is obtained to utilize, the consideration in full to parties of the first part for said well No. 2 shall be an annual rental sum of eight hundred dollars, to be paid quarterly in advance, first payment to be made two years from date of this lease, when annual rental shall begin, and be paid each year thereafter. * * * In case of delay in the completion of the two wells as herein specified, the annual rentals shall be paid in full in manner as herein specified, and parties of first part agree to accept such annual rental as consideration for such delay. * * *

"Should party of second part fail to pay to party of first any of said payments within thirty days of the times herein specified, at their Chartiers Valley Gas Company office, Pittsburg, Pa., such failure renders this lease null and void, and to remain without effect between the parties hereto. * * * The said party of the second part is further to have the * * * right to remove all machinery and fixtures placed on said premises by them. * * *

"In witness whereof, we, the said parties of the first and

second part, have hereunto set our hands and seals, the day and year above written.

"Witness:

"John Miller.

"Thomas J. Bray.

"Louisa Ahrns. [Seal.]

"George Ahrns. [Seal.]

"Henry Ahrns. [Seal.]

"Lewis Ahrns. [Seal.]

"James Chambers, President. [Seal.]

"[Company Seal.]"

The Chartiers Valley Gas Company, the defendant in this case, entered upon the premises described in the lease offered in evidence, and drilled well No. 1, and obtained gas, which was utilized and paid for by it for more than two years, when the well was plugged, the casing pulled, and the rig taken down. The company never drilled another well, never paid to the plaintiffs anything on account of and for delay in not drilling well No. 2, and never did anything further on the farm than drill No. 1, and operate it as before stated.

CONCLUSIONS OF LAW.

Under these facts, two questions of law arise: First. Are the plaintiffs entitled to recover anything? Second. Are they entitled to recover more than the rental for six years immediately preceding the day when this action was instituted? In answering the first question, we are to consider the questions of law reserved in our answers to the defendant's points numbered 2, 3, 4, 4½ and 5. In these points the defendant's counsel, in substance, asked the court to instruct the jury to return a verdict for the defendant (1) because the lease had been abandoned, and (2) because the lease offered in evidence was not the lease of the Chartiers Valley

Gas Company, and did not support the plaintiffs' statement to that effect.

The defendant's argument in support of the first reason is this: The lease granted to the defendant the right to explore for oil and gas; and that, after the test of the first well was made, it considered its search for oil and gas unsuccessful, and abandoned the premises; and that the plaintiffs, having delayed bringing their suit for rentals until March 27, 1897, cannot recover on account of the unreasonable delay in electing not to forfeit the lease, but to bring suit, as they did. This argument, in our opinion, does not sustain the proposition it seeks to establish. Although the lease may have only given the defendant company 'the right to explore for oil and gas' in the first instance, as decided in *Venture Oil Co.* v. *Fretts,* 152 Pa. St. 451, 25 Atl. 732, the fact that the lessee drilled upon the leased premises, and obtained gas, which for over two years was utilized and paid for, perfected its title to all the gas in and under said premises. The privilege to explore for gas was, in the first instance, but an inchoate right. Exploration and discovery of gas in paying quantities, however, perfected the title, not only to the gas mined, used, and paid for, but to all the gas in and under the farm that might be brought to the surface by drilling other wells. More than that, the lessee in the case at bar had not the right to abandon the lease even if the drilling of the first well had not resulted in the discovery of oil or gas, for the reason that it expressly covenanted to "drill on said premises at least two wells," or pay the rentals provided for. But, granting that the lessee had the right to abandon the lease, the evidence in the case does not show that the company exercised it. The plugging of the first well, the pulling of the casing, and the taking down of the rig, was no such act on the part of the lessee as would have justified the plaintiffs in concluding that it intended to aban-

don and surrender its rights under the lease. It was simply evidence that well No. 1 no longer produced gas in paying quantities. And, in addition to that, the lessee did not surrender or offer to surrender to the plaintiffs its written lease, or to place upon record any paper showing that the recorded lease to them had been surrendered. We are therefore of the opinion—First, that the defendant company had no right to abandon this leasehold even if well No. 1 had proven a total failure, as it had expressly contracted to test the farm by drilling two wells; and, second, that there is no evidence in the case to show that the plaintiffs knew or ought to have known that the defendant ever intended to abandon and surrender its rights under the lease.

Neither can we see how the authorities cited by the counsel for the defendant on the question of election have any bearing upon the issue here joined. It is true that the forfeiture clause in the lease was inserted for the benefit of the plaintiffs, and it was for them to elect whether they would forfeit the lease, or not, upon the failure of the defendant to perform its covenants. It may also be true that the right to declare a forfeiture must be promptly exercised. But the plaintiffs in this case are not seeking to enforce a forfeiture. If this was an action of ejectment by the plaintiffs against the defendant, then the argument of counsel might have some force. This suit is based upon the covenant of the defendant, and no election on the part of the plaintiffs was necessary in order to maintain it. It might be defeated by the defendant showing that the plaintiffs had elected to forfeit the lease; but the plaintiffs, to recover the rentals, are not bound to show in their case that they did not forfeit it. And, surely, their delay in bringing the suit will not estop them from maintaining it. There is no obligation upon a creditor to promptly sue his debtor. The penalty of indulgence by the creditor is not the forfeiture of a right of action against the debtor, unless that indulgence comes within the provi-

sions of the statute of limitations. And in this case, the suit being upon a sealed instrument, the statute of limitations has no application. *Davis* v. *Shoemaker,* 1 Rawle, 135.

This brings us to the second reason why the defendant company asked the court to give the jury binding instruction to find for the defendant, and that was as set out in the defendant's point numbered 4½: "That the lease offered in evidence by the plaintiffs shows on its face that it is not the deed of the Chartiers Valley Gas Company, is not signed by the company, as it was averred to have been signed both in the original statement and in the amended statement, and it is not a basis upon which the plaintiffs can ask for a recovery in this case under their statement." Section 5 of rule 3 of our court rules provides: "In actions upon deed, bond, or other instrument of writing, a copy of which shall be filed on or before the return day of the writ, it shall not be necessary for the plaintiff on the trial to prove the execution thereof, but the same shall be taken as admitted, unless the defendant, by affidavit filed with or before plea entered by him, shall deny that the same was executed by him or by his authority." It is admitted that a true copy of the lease was filed on or before the return day, and that the defendant did not file an affidavit denying that the lease was executed by it or by its authority. This being the case, in the language of the rule, the lease must be taken as admitted; and on its face, from first to last, it purports to be a lease wherein the Chartiers Valley Gas Company is the lessee. The covenant sued upon is expressly stated to be its covenant,—the covenant of the party of the second part,—and the party of the second part is expressly stated to be the Chartiers Valley Gas Company. But, even if the court rule cited did not estop the defendant from denying that the lease offered in evidence was the lease of the defendant, we think that the fact that it took possession of the plaintiff's farm under the lease, drilled a well,

obtained gas, and paid for it, and afterwards executed a written agreement referring to the leasehold created by the lease as its property, would estop it from denying that the lease was executed by its authority, and was binding upon it.

And now, April 19, 1898, judgment non obstante veredicto refused; and, upon payment of the jury fee, judgment will be entered in favor of the plaintiffs upon the verdict of the jury.

H. M. DOUGAN, D. T. WATSON and J. R. STERRETT, for appellant.

M. L. A. & B. E. MCCRACKEN, for appellees.

PER CURIAM. The judgment in this case is affirmed, on the opinion of the learned court below.

C. W. STONE ET AL. v. THE MARSHALL OIL CO. ET AL.

(188 Pennsylvania 602; 41 Atl. 748. Supreme Court. November 14, 1898.)

[1]**Equity jurisdiction in accounting case.** Equity has jurisdiction of a bill for discovery to ascertain the rights and relations of the parties to a lease of oil and gas lands, and subleases thereunder, and for an accounting for the profits from the sale of the gas.

Bill for account after long silence. Plaintiffs, who had leased oil land from the owner, sublet a portion of it to an oil company, reserving certain royalties. The latter, after digging a well, obtained a new lease directly from the owner, and assigned it to another oil company, which in turn assigned it to a gas company. These last two companies had notice of plaintiffs' lease to the first company, and none of them had inquired whether plaintiffs had abandoned their lease. *Held* that, where plaintiffs had said or done nothing to mislead the companies, they were not guilty of laches in not bringing a bill for an accounting and discovery under their lease until over five years after the completion of the well and the assignment of the second lease.

Owner letting direct to sublessees. Plaintiffs leased oil and gas land from the owner in consideration of a quarterly rental, and a portion of the oil or gas which might be discovered. They sublet a portion of the premises to an oil company, subject to the conditions of the original lease, which the sublessees assumed. Plaintiffs continued to pay the rent until that falling due on May 13, 1888, which was not paid. On June 19, 1888, the owner executed a new lease directly to the sublessees, providing that they should stand between him and 'all who may have claims to this lease." *Held*, that the latter lease did not work a forfeiture of plaintiffs' lease from the owner.

Such overletting held fraud. Plaintiffs leased oil and gas land from the owner, and afterwards sublet a portion of it to an oil company, which agreed to drill two wells, and pay plaintiffs one-fourth of the profits from them. After completing one well, the sublessees

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[1]Proceedings in equity where the lessor of a gas well wrongfully ousted the lessee. Lump sum awarded to lessee as damages. *Poterie Gas Co.* v. *Poterie*, 179 Pa. 68; 36 Atl. 232.

Lessee of a minority cotenant, being excluded by the owner of the larger interest, the excluded lessee was allowed his full share of the profits as damages, by a divided court. *Paul* v. *Cragnaz*, 25 Nev. 293; 59 Pac. 857; 60 Pac. 983.

procured a lease direct from the owner, which did not require two wells, or payment of the royalties. *Held*, that the second lease was a fraud on plaintiffs.

Sale of gas amounts to sublease. A sale, by the lessees of a gas well, of the gas flowing from it, to a gas company, which took charge of the well and conducted the gas off the premises, is really a sublease of the well itself.

Royalty covenant runs with the land. A covenant, in a lease of oil and gas land, to give to the lessor a portion of all oil and the profits of all gas discovered on the land, is a covenant running with the land.

[2]**Profits. Expenses.** In ascertaining the amount due under a covenant, in a lease of gas land, to give one-fourth of the profits of all gas "conducted off the premises, for use or sale," above the costs, all expenses, including cost of pipes and materials, and payments for right of way and for employes' salaries, are to be deducted from the sales.

Gas used by the lessee should be charged for at the same rates as if sold to others.

Appeal from Court of Common Pleas, Allegheny County.

Bill by J. B. Akin and others against the Marshall Oil Company and others for discovery to ascertain the relations of the parties to gas leases, and for an account for plaintiffs' share of the profits from a sale of gas. Decree for plaintiffs, appointing a master to take testimony and state an account, and defendant the Marshall Oil Company appeals. Affirmed.

The trial court, White, P. J., rendered an opinion as follows:

FINDINGS OF FACT.

1. On the 13th day of November, 1885, John Grimes gave an oil and gas lease to J. B. Akin, his executors, administrators, and assigns, of 150 acres of land in Washington county, "for the sole and only purpose of drilling and operating for petroleum oil or gas, for the term of three years, or as long thereafter as oil or gas is found in paying quantities." Akin

[2]Expenses and improvements allowed. *Graham* v. *Pierce*, 14 M. R. 308. *Taylor* v. *Thomas*, (Colo.) 71 Pac. 381; 22 M. R. —.

was to give one-eighth of the oil, and pay "seven hundred dollars per annum for the gas from each and every well drilled on the premises, in case the gas is conducted and used off the premises." Akin was to complete one well within a year from the date of the lease. He was to pay Grimes "one hundred and fifty dollars per annum, commencing six months after this date," payable quarterly; and Grimes agreed to accept that sum "as full consideration and payment for each yearly delay, until one well shall be completed." And a failure to complete one well or to make any of said payments within such time rendered the lease null and void. The lease was acknowledged by Grimes on the 3d day of December, 1885, and was recorded in Washington county, July 22, 1886.

2. Akin sold and assigned one-half interest in the lease to R. B. Stone, A. J. Hazeltine, and C. W. Stone on the 2d day of December, 1886, which was acknowledged the same day and recorded the same day, in Washington county. Akin & Co. drilled no well, but paid the quarterly installments. On August 19, 1887, they executed a lease to the Marshall Oil Company of fifty acres of the farm; reciting the lease from Grimes to Akin, and its provisions. The lease was "for the sole and only purpose of drilling and operating for petroleum oil or gas for the period of one year, and as long thereafter, less than the term of said original lease, as oil or gas may be found in paying quantities,—subject, however, to all the reservations, stipulations, rents, and covenants in said original lease contained, all of which are to be faithfully kept and performed by the said party of the second part [the Marshall Oil Company], its successors and assigns." The Marshall Oil Company agreed to drill four wells,—one to be completed within four months, one in eight months, one in twelve months, and one in sixteen months.

There was this further provision, which is the founda-

tion of this suit: "In further consideration of the lease hereby granted, the said parties of the second part [the Marshall Oil Company], for itself, its successors and assigns, agrees to give to said parties of the first part [the plaintiffs], their executors, administrators, and assigns, one-fourth of all petroleum produced from said premises [one-eighth to the credit of John Grimes, the original lessor, and one-eighth to the lessors of this lease]. It is also agreed that in case gas shall be discovered, and conducted off the premises for use or sale, the said parties of the first part, in the proportionate interests aforesaid, shall receive one-fourth of the profits thereof above cost and bonus of seven hundred dollars to the original lessor." This lease was acknowledged on the 19th day of August, 1887, and recorded in Washington county on the 20th day of August, 1887.

3. On December 25, 1887, Akin & Co. made a supplemental lease to the Marshall Oil Company of thirty acres more of the Grimes farm, on the same terms, stipulations, and conditions as the lease of the fifty acres; reciting it, and providing that in place of the four wells, none of which had been drilled, two wells should be drilled, one on the fifty-acre tract and one on the thirty-acre tract, and that one well should be completed within four months; "and as to all wells that may be drilled on either portion of said premises, the royalty of oil and gas shall be as fixed by the lease" of the fifty-acre tract.

4. The Marshall Oil Company then proceeded to drill a well, which was completed on the 8th day of May, 1888,—the only well ever drilled on the Grimes farm. It was drilled down to the oil rock, but produced no oil. It was a strong gas well. The Marshall Oil Company did not attempt to utilize the gas, but for a month or so endeavored to sell the well. After some delay and negotiations they sold it to the Washington Oil Company, in connection with a lease for fifteen acres for $4,000.

5. While these negotiations were going on, and while the well was being gauged to ascertain the pressure of the gas, the Marshall Oil Company obtained a lease of John Grimes for the whole farm, dated the 19th of June, 1888. This lease was nearly identical with the lease from Grimes to Akin, except that $600 instead of $700 per annum should be paid for every gas well, when the gas should be conducted and used off the premises, and for the gas well then completed $700 per annum should be paid; and there was no requirement in this lease to put down any additional well. This lease was acknowledged by Grimes on July 4, 1888. Grimes by a separate agreement, agreed to reduce the annual rental of the gas well to $500. The Marshall Oil Company then, by sale and lease dated July 5, 1888, sold the well, and leased fifteen acres to the Washington Oil Company, in consideration of $1,000 cash paid, and subject to all the terms and conditions of the lease of the 19th of June, 1888.

6. The Washington Oil Company tubed the well, and conducted the gas off the premises, for sale or use, from August, 1888, to September 2, 1889, and then sold the gas to the Taylorstown Natural Gas Company, by bill of sale dated September 2, 1889; and that company has been conducting the gas off the premises and selling it ever since.

7. The rent due to Grimes on his lease to Akin was paid promptly until February 13, 1888. The rent for the quarter ending May 13, 1888, was not paid.

8. Grimes never declared a forfeiture of his lease to Akin of November 13, 1885. When he made the lease to the Marshall Oil Company of June 19, 1888, he required a statement to be inserted in the lease, before he would sign it, as follows: "The party of the second part [The Marshall Oil Company] agrees to stand between the party of the first part [himself] and all who may have claims to this lease." After the lease was signed he said to Mr. Akin that he signed it because he wanted to get all the money out of the

farm he could; that he didn't know whether his lease was good or not, but the Marshall Oil Company had agreed to stand between him and harm.

9. The Taylorstown Natural Gas Company was simply a device of the Washington Oil Company to get certain privileges and advantages which it could not get under its charter. It wanted the power to secure the right of way for laying pipes and conducting gas to distant points and selling it, which it could not do under its charter as an oil company. The large majority of the stock of the Taylorstown Natural Gas Company is owned by the Washington Oil Company, the officers of the two companies are nearly the same, the Washington Oil Company has the entire management and control of the business, and receives all, or nearly all, the profits. The paper of September 2, 1889, although called a "bill of sale," is virtually a lease. No cash or hand money was paid. It sells the gas of the well for twenty years, if it shall so long pay to pipe it; the Taylorstown Natural Gas Company to pay the annual royalty to Grimes, and $400 a year to the Washington Oil Company.

10. When the drilling ceased, May 8, 1888, the flow of gas indicated a strong gas well. Several tests were made to ascertain the pressure, and each test showed an increased pressure, and indicated a very strong gas well. By the 4th of July, when the Marshall Oil Company sold to the Washington Oil Company, it was known to be a remarkably strong gas well,—a wonderful gas well, as some of the witnesses described it. It has produced an immense volume of gas, sufficient to supply the boilers for drilling forty or fifty wells at the same time, and still continues, after nine years, to produce gas, with little or no diminution of force or volume.

11. After the gas well was completed, May 8, 1888, by the Marshall Oil Company, the plaintiffs did nothing under the Grimes lease to Akin; and although they knew of the

Grimes lease to the Marshall Oil Company, of June 19, 1888, they took no legal steps to test that lease, and made no demand of any of the defendant companies for a share of the profits of the gas, until about the time this bill was filed, July 25, 1893, five years after the Marshall Oil Company had sold to the Washington Oil Company.

CONCLUSIONS OF LAW.

1. Is this a proper case for a court of equity? The bill was filed for discovery, to ascertain the facts as to the relations of the different defendants to the question at issue, as to the disposal of the gas from the well, and for an account for plaintiffs' share of the profits from the sale of the gas. These matters bring the case properly within the jurisdiction of a court of equity.

2. It is claimed that the plaintiffs were guilty of such laches that they cannot maintain this bill. The statute of limitations cannot apply, for the delay in bringing suit is less than six years from the time the well was completed. It was only five years from the sale by the Marshall Oil Company to the Washington Oil Company, and less than four years from the sale to the Taylorstown Natural Gas Company. In the meantime, the plaintiffs said or did nothing to mislead the defendant companies. They all had actual as well as constructive notice of the lease from plaintiffs to the Marshall Oil Company. None of them inquired of the plaintiffs whether they had abandoned their lease, or contended that it was still binding. The Marshall Oil Company had a right to make a sale or lease to the Washington Oil Company, and that company to the Taylorstown Natural Gas Company without the consent of plaintiffs,—subject, of course, to the terms of the lease of plaintiffs to the Marshall Oil Company, if that lease was still valid. The silence of the plaintiffs therefore was immaterial. If that lease was

still valid, they would have to account for a share of the profits from the sale of gas. Besides, there was a continuous liability from year to year.

3. The main ground of defense is that the lease from Grimes to Akin was forfeited. If that is true, the plaintiffs have no case. Grimes had a right to forfeit the lease for non-payment of the quarterly installment of rent but it is admitted that the rent was paid until February 13, 1888, and the next quarter would not be due until May 13, 1888. The well was completed May 8, 1888. After the lease from plaintiffs, the Marshall Oil Company was liable to pay the rent. Of course, if neither party paid Grimes, he could forfeit the lease. Did he do so? Mr. Hart, a member of the Marshall Oil Company, testified that when Grimes visited the well on the 7th or 8th of May, while they were finishing the drilling, and discovered it was a gas well, Grimes said to him, "The lease is forfeited for non-payment of rent." Grimes denies this, but Grimes could not forfeit the lease then, as no rent was due, or would be due until the 13th of May. But it is contended that the lease of Grimes to the Marshall Oil Company of June 19, 1888, was a declaration of forfeiture. That would be true, if the lease was made for that purpose, and ordinarily there would be that presumption. A clause in that lease, inserted at the request of Grimes before he would sign it, proves that he did not intend that lease as a forfeiture of the prior lease to Akin. It was expressly provided that the Marshall Oil Company should stand between him and "all who may have claims to this lease." That means all who might have claims to the leased premises under a former lease. This clause proves two things: First, it was not an act on the part of Grimes intended to declare a forfeiture; and, second, that the Marshall Oil Company knew that fact, and took that lease with full knowledge that there might be a contest, and voluntarily assumed the risk.

4. It is very evident that the Marshall Oil Company, in procuring the lease from Grimes of June 19th, acted in bad faith, and was guilty of a legal fraud upon the plaintiffs. They were bound, under the plaintiff's lease, to drill another well, and pay one-fourth of the profits from the sale of gas. They were negotiating with the Washington Oil Company to buy the property. They procured this lease from Grimes for two purposes: First, to get clear of drilling another well, which they were bound to do under the lease from the plaintiffs, and there is nothing in their lease from Grimes requiring them to drill another well; and, second, to get clear of paying the one-fourth of the profits of the sale of the gas, as there is nothing of that kind in their Grimes lease.

5. The Washington Oil Company is not an innocent purchaser or lessee. They knew that the Marshall Oil Company had drilled the well under a contract and lease from the plaintiffs; that it was completed more than a month befor the Grimes lease of June 19th. They knew, or they were bound to know,—because that lease was on record,—all the terms and conditions of that lease. The clause in the Marshall Oil Company's Grimes lease, that that company should stand between Grimes and all persons claiming an interest in the lease, was plain warning that the lease might be contested; and yet, notwithstanding that knowledge and that plain warning, they did not inquire of Grimes or the plaintiffs whether their lease was forfeited, or claimed to be valid. With their eyes open, they bought this well, and took a lease of fifteen acres from the Marshall Oil Company; knowing, as they must have known, that in procuring that lease from Grimes the Marshall Oil Company was guilty of bad faith, if not manifest fraud, towards the plaintiffs.

6. If the Grimes lease to the Marshall Oil Company was a fraud upon plaintiffs' rights under the Grimes lease to Akin, it has no validity. The Marshall Oil Company could convey by virtue of it no title or rights to the Washington

Oil Company. The title and rights conveyed to the Washington Oil Company must therefore be under the lease from the plaintiffs, and the Washington Oil Company would be a sublessee under the plaintiff's lease.

7. The sale of the gas by the Washington Oil Company to the Taylorstown Natural Gas Company is virtually a sale of the well and a part of the leasehold realty. The Taylorstown Natural Gas Company took possession of the well, and has retained possession ever since. The Washington Oil Company had nothing whatever to do about the well or delivering the gas. The parties cannot change or disguise the real transaction by calling it a "bill of sale." Courts—especially courts of equity—will always look through and underneath technical terms, to get at the real transaction, and call it by its proper name. The Taylorstown Natural Gas Company is a purchaser or lessee of the well, which, of course, includes the gas flowing from it; and this company is in exclusive possession and enjoyment of the part of the leasehold realty, in the lease from the plaintiffs to the Marshall Oil Company. It is a sub-sublease, and as such subject to all the covenants in the original lease.

8. If the foregoing views are correct, there can be but little difficulty on the question whether the covenants in the plaintiffs' lease to the Marshall Oil Company run with the land. In general terms, it may be said that when a covenant is for the performance of some duty in connection with the possession, and relating to the land, or in the nature of rent or royalty for the use and enjoyment of the premises, it is a covenant running with the land. Kerr, Real Prop. §§ 1218-1222; 1 Washb. Real Prop. (5th Ed.) 528; 2 Washb. Real Prop. 298; 1 Smith, Lead. Cas. 230, 231. The rent need not be money. It may be a share in the product, as a share of the crops on a farm or the share of oil in an oil lease. *Fennell* v. *Guffey,* 139 Pa. St. 341, 20 Atl. 1048; Id. 155 Pa. St. 38, 25 Atl. 785. *Landell* v. *Ham-*

ilton, 175 Pa. St. 327, 34 Atl. 663. A share of the gas stands on the same footing as a share of the oil. A share of the oil may be delivered at the well or in pipe lines, as a share of the gas could not be delivered in specie at the well or elsewhere. The only way of sharing it would be to share in the proceeds of sale.

9. The plaintiffs are entitled to an account from the defendant companies of the profits realized from the sale of the gas. To ascertain the profits, all expenses of every kind must first be deducted from the proceeds of the sale. If the gas was used by the Washington Oil Company or the Taylorstown Natural Gas Company in drilling wells of their own, or otherwise using the gas in their own business, they should be charged for that at the same rates as though sold to others, or what it was really worth. The expenses include seven hundred dollars rental to Grimes under the original lease; cost of pipes and other materials in keeping up the lines; payments for right of way; payments to all employees engaged in attending to the well, pipes, etc., and the business generally of saving, transporting and selling the gas. Although Grimes reduced the annual rental to $500, that was a special favor to defendants, of which the plaintiffs cannot claim any benefit. Their lease with Grimes required them to pay $700 annually.

A master will be appointed to take testimony and state an account against the Washington Oil Company and the Taylorstown Natural Gas Company. On his report coming in, the court will consider the liability of the Marshall Oil Company, and any other questions that may properly arise. If the parties can agree within twenty days upon a master, he will be appointed; if not, the court will appoint.

The court subsequently entered the following decree:

This cause came on to be heard upon the issues framed and proofs offered in support thereof, by both plaintiffs and defendants, and upon argument of counsel, after due con-

sideration thereof, and of said issues and proofs, an opinion was filed on January 15, 1898, wherein the findings of fact and law by the court were specifically stated, and in pursuance thereof, now, February 1, 1898, it is ordered, adjudged and decreed that the plaintiffs are entitled to an account from the defendant companies of the profits realized from the sale of the gas from the well on the Grimes farm described in the bill of complaint in this case, and that to ascertain the profits, all expenses of every kind must first be deducted from the proceeds of the sale of said gas; and that if the gas was used by the Washington Oil Company or the Taylorstown Natural Gas Company in drilling wells of their own, or the gas was otherwise used in their own business, they should be charged for said gas, at the same rates as though sold to others, or at what said gas was really worth; the expenses to include seven hundred dollars ($700) annual rental to Grimes under the original lease, the costs of pipes and other materials in keeping up the well, payments for rights of way, payments to all employees engaged in attending to the wells, pipes, etc., and the business, generally, of saving, transporting and selling the gas, and that J. C. Gray be appointed master to take testimony, and state an account against the Washington Oil Company and the Taylorstown Natural Gas Company, and that upon his report coming in the court will consider the liability of the Marshall Oil Company, and any other questions that may properly arise.

Error assigned was the decree of the court.

EDWARD MCSWEENEY and R. W. CUMMINS, for appellant.

A. LEO WEIL and CHAS M. THORP, for appellees.

PER CURIAM. The decree in this case is affirmed on the opinion of the learned court below.

JAMES WADE v. SOUTH PENN OIL CO.

(45 West Virginia 380; 32 S. E. 169. Supreme Court of Appeals. November 16, 1898.)

[1]**Merger of lease in lease.** If a lessee for life or years take a new lease of the reversioner for a longer or shorter term than before, it is a surrender of the first lease.

Lease and option. A lease yielding rent and an option to purchase the fee outright are not inconsistent, and the taking such lease during the term of the option will not abrogate or surrender it.

Purchase merges the lease. Where there is a lease for years with rent, and an option to purchase the fee, an election to purchase under the option, and tender of the purchase price under it, ends the lease and its rent.

A purchase of the reversion in fee by a tenant for years ends the tenancy, and the tenant is not thereafter estopped from denying further continuing title or rent in the landlord.

(Syllabus by the Court.)

Appeal from Circuit Court, Wetzel County; Romeo H. Freer, Judge.

Bill by James Wade against the South Penn Oil Company. Decree for defendant, and plaintiff appeals. Affirmed.

THOMAS P. JACOBS and J. W. NEWMAN, for appellant.

A. B. FLEMING and U. N. ARNETT, for appellee.

BRANNON, President. Wade, on June 9, 1890, made a lease for five years to McCaslin of a tract of land for produc-

[1]Rights of second lessee where the lessor lets the land for a longer term than the term of the first lease. *Logan* v. *Green*, 10 M. R. 322.

Where the holder of collateral becomes owner by assignment his lien merges. *Strout* v. *Natoma Co.* 10 M. R. 330.

Where the holder of one of several mechanics' liens buys the property, the property should be sold and the buyer allowed to pro-rate. *Bullock Co.* v. *Sunday Lake Co.* (Mich.) 93 N. W. 611.

tion of oil and gas, giving Wade one-eighth of the oil and $600 per year for each gas well as rent, which lease was assigned, July 2, 1890, by McCaslin to South Penn Oil Company. On April 5, 1894, Wade made a deed, which, in its granting clause, granted to one Smith all the oil and gas in the tract, but the deed says that it was agreed that Smith had an option to buy at the end of five years the oil and gas in the tract, and on payment they were to be conveyed to him; and the deed further states that it was on the condition that Smith should, within 30 days after the completion of a well, either pay Wade $1,252, or release and reconvey; and it further states that it was on condition to be void if a well should not be completed in five years, unless Smith should pay $1,252 before the expiration of that time; and it further provided that, if "the above lease become void," then the oil and gas right should draw one dollar per acre yearly until "this option is paid in full, then deed to be made by parties of first part, or surrendered." Smith assigned his rights under this instrument to the South Penn Oil Company, April 16, 1894. Afterwards, July 31, 1895, the South Penn Oil Company took from Wade a lease of the same land for production of oil and gas for the term of 10 years, covenanting to pay Wade as rent one-eighth of the oil and $550 per year for each gas well. The company made no development during the life of the McCaslin lease, but under the lease to itself it developed oil upon the tract in paying quantity, and tendered Wade $1,252 in full satisfaction of his rights to the oil and gas, claiming right to do so under the said option; but Wade refused to receive it and the money was paid in bank to his credit, and the answer of the company still tenders it. Wade demanded an eighth of the oil, and, the company refusing it, Wade brought this suit to compel a discovery of the oil produced from the tract, and for an account thereof. The circuit court dismissed his bill, and he appeals.

There is no dispute of facts. The sole question in the case is as to the effect of said papers. There can be no question that the taking of the second lease was, by law, a surrender of the McCaslin lease by the company as, if a lessee for life or years, or his assignee, take a new lease, of the reversioner, for a greater or shorter term than before, there is a surrender of the first lease. 2 Minor, Inst., 791; 2 Tayl. Landl. & Ten. § 512. But then comes the question, what is the effect of the second lease upon the option instrument? If it were a mere lease, it would be surrendered like the first lease; but it is not a lease. What is it? It is an option to buy all the oil and gas within five years of its date. Read by its four corners, it imports nothing else. If its strictly granting part stood alone, it would be an absolute grant, and, no doubt, the subsequent lease covenanting to pay a share of the oil would be binding on the lessee company, for there is the covenant to pay, and a lessee cannot deny his landlord's title or his agreement to pay rent; and even when one who is the real owner enters into a lease leasing his own land from another, this rule prevents him from setting up title in himself. 3 Tayl. Landl. & Ten. § 80. To bring the case under this doctrine, counsel for Wade contends that by the first lease and said option deed the company, at the date of the second lease, owned all the oil, and, taking the second lease, it is the case of a man making himself by deed a tenant to another of his own land, and he cannot deny his landlord's title, or avoid the rent. This would be so were this option not a mere option, but an instrument of absolute grant which has already invested the company with ownership of the oil. But it had not so operated; it was a mere right to elect to become such owner. If an absolute grant, why such profuse provisions of option to purchase? There is no legal inconsistency between the second lease and the option. The former gave the lessee the right to mine for oil for ten years, paying rent; the latter gave the separate dis-

tinct right to purchase outright, at a fixed price, within five years. The purchase would, of course, close the lease by merger, as the right to the rental would pass from the landlord upon his sale of the fee to the tenant, and the leasehold estate would sink and cease in the reversion, the greater estate, upon their union in the same person, under well-known principles. Tied. Real Prop. § 63. And it is clear, when a tenant purchases the fee, his estoppel to deny the landlord's title ceases, because the tenancy ceases. *Campbell* v. *Fetterman's Heirs,* 20 W. Va., 398; 2 Tayl. Landl. & Ten. § 502. He may thereafter set up his own title in fee against rent. Wood, Landl. & Ten. 373. The option invested Smith, before the second lease, with only an election to purchase, and its acceptance after said lease made a purchase after it. *Swearingen* v. *Watson,* 35 W. Va. 463, 14 S. E. 249. Surely, a tenant can make a purchase of the fee after he becomes a tenant. This is all I see in the case. Upon tender of the price fixed for a purchase, Wade was not entitled to a share of the oil, and had no right to demand an account of the oil produced, and his bill was properly dismissed. He is entitled only to the $1,242. Decree affirmed.

Affirmed.

WILLIAM HINES ET AL. v. FRANK MILLER ET AL.

H. G. READER ET AL. v. SAME.

(122 California 517; 55 Pac. 401. Supreme Court. November 30, 1898.)

Where the miners are employed by one in charge of the work as agent of the owners in the working of the claim, the rule of notice to or knowledge by the owners of the performance of labor in improvements made by persons other than the owners, provided for by Section 1192 of the Code of Civil Procedure, has no application.

[1]**Courts will take judicial notice of the meaning of ordinary mining terms** such as shaft, tunnel, level, chute, stope, uprise, cross-cut, incline, etc.

Miners employed to do development work are entitled to a lien as fully as those actually extracting ore.

The lessor has notice and his estate is bound where the lease expressly calls for the work done and the lessor does not give the statutory notice.

Commissioners' decision. Department 2. Appeal from Superior Court. Tuolumne County.

Action by William Hines and others against Frank Miller and others, and by H. G. Reader and others against Frank Miller and others. The actions were consolidated, and from judgments for plaintiffs defendants appeal. Affirmed.

EDWIN A. RODGERS, for appellants.

E. P. OTIS and F. W. STREET, for respondents.

[1]Or they may be explained by competent witnesses. *Cambers* v. *Lowry*, 19 M. R. 539.

Necessity for expert testimony in oil and gas cases stated. *Douthett* v. *Fort Pitt Co.* 202 Pa. 416; 22 M. R. —. *Shewalter* v. *Hamilton Co.* 28 Ind. App. 312; 62 N. E. 708.

The court will take judicial notice of the inflammable and explosive nature of oil and natural gas. *Jamieson* v. *Indiana Co.* 128 Ind. 555; 28 N. E. 76. *State* v. *Hayes*, 78 Mo. 307. *State* v. *Moore*, 27 Ind. App. 83; 21 M. R. —.

SEARLS, C. Two actions to foreclose mechanics' liens upon the Pampa Hill quartz mine, situated in the county of Tuolumne. The actions were consolidated, the cause tried by the court sitting without a jury, and written findings filed, upon which judgment of foreclosure was rendered in favor of the plaintiffs. Defendants appeal from the judgment, and from an order denying their motion for a new trial.

Appellants interposed a demurrer to the complaint, upon the ground that it did not state facts sufficient to constitute a cause of action. This demurrer was properly overruled.

The precise objection to the complaint is that it shows that certain of the defendants (the appellants here) were the owners of the mining claim, and that it fails to show that they had notice of the performance of the labor performed thereon by plaintiffs, while it was being so performed, as provided by section 1192, Code Civ. Proc.

The response to this contention is that the complaint does not show that the labor was performed for any person or persons other than the owners. It avers that the several plaintiffs performed the labor at the special instance and request of one William Moorehead, who was in charge of and superintending the work, and who was, as they are informed and believe, during said time, "the agent of defendants in the working of said claim." If this was true, the doctrine of notice to the defendants required in cases where the improvements are made by others than the owners had no application. There are several causes of action set out by the several plaintiffs in each of the cases, but, as they are all precisely alike in the respect noticed, what is said of one applies equally to all.

2. The contention that plaintiffs failed to show that the labor which they performed entitled them to a lien upon the mine cannot be maintained.

The allegations of the complaint are (and the evidence

sustains them) that the several plaintiffs performed labor as miners in sinking a shaft on that certain mining claim, describing it as a quartz mining claim. Section 1875 of the Code of Civil Procedure provides that courts will take judicial notice of certain things, among which are "the true significance of all English words and phrases, and of all legal expressions." The true meaning of such expressions as shafts, tunnels, levels, chutes, stopes, uprises, cross-cuts, inclines, etc., when applied to mines, signifies instrumentalities whereby and through which such mines are opened, developed, prospected, improved, and worked. *Helm* v. *Chapman,* 66 Cal. 291, 5 Pac. 352; *Silvester* v. *Coe Mining Co.,* 80 Cal. 512, 22 Pac. 217.

He who engages in the construction of those prime requisites upon or in a mine is engaged in mining, equally with one who extracts the gravel or ore therefrom. It follows that there was no error in this respect in the findings or conclusions of law deduced therefrom.

3. The third and fourth assignment of errors may be considered together. The third avers a want of evidence to support a finding that certain of the defendants (lessees of a mine) were working the mining claim "under a written agreement so to do with the owners thereof."

The fourth assignment of error is based upon an alleged want of evidence to support a finding that the labor of the lienholders "was performed with full knowledge of all of said defendants," among whom were the owners of the mining claims.

The answer of the defendants, Frank Miller, R. B. Lane, Andrew Sweetzer, and Ellen Staples, who are the appellants here, sets up, and the evidence shows, that they were the owners of the mining claim known and designated as the "Pampa Hill Quartz Mine"; that on the 28th day of August, 1895, they entered into a written agreement with

H. S. Brown, whereby they agreed to sell and convey said mine to the latter for $7,000, to be paid in installments between that date and on or before June 1, 1896.

The agreement contains the following clause: "And the said above-named Frank Miller, R. B. Lane, Andrew Sweetzer, and Ellen E. Staples, owners of said Pampa Hill gold quartz mine, hereby grant permission unto the said H. S. Brown, or to his heirs, associates, or assigns, to enter into the immediate possession of said Pampa Hill mine, and proceed to work and develop the same in such manner as may be deemed most expedient or advisable, either by sinking shafts, running tunnels, or otherwise, and granting permission to remove and mill, or mill upon the premises, all ore extracted from said mine during the life of this agreement," etc.

The agreement then provides that one-fourth of the gross product taken from the mine shall be paid to the owners, and applied as a partial payment on the purchase price.

E. W. Roberts and W. H. H. Hart became equally interested in the contract with H. S. Brown, and they caused the shaft to be sunk on the mine, for which the liens were taken by the laborers thereon; one William Moorehead acting as superintendent under them, and employing the lienholders. The lessees (so called) and superintendent were made parties defendant, duly served with process, and made default.

The foregoing quotation constituted the only notice to appellants of the prosecution of the work, and there was no proof that they gave the notice provided for in section 1192 of the Code of Civil Procedure. Under that section every building or improvement constructed upon any lands with the knowledge of the owner shall be held to have been constructed at the instance of such owner, and his interest is subject to a lien, unless he shall, within three days after he shall have obtained knowledge of the construction, etc.,

or the intended construction, etc., give notice that he will not be responsible for the same, by posting a notice in writing to that effect in some conspicuous place on the premises.

Was the evidence offered by the agreement sufficient to authorize the finding that appellants had notice.

In *Evans* v. *Judson,* 120 Cal. 282, 52 Pac. 585, Judson held a lease from the owner, which provided that the lessee might remove all improvements made by him on the premises, unless the same should be so incorporated with existing structures that removal would leave the latter in worse condition than at the date of the lease, in which case the added improvements were to become the property of the lessor. Judson made improvements, for the construction of which liens were filed.

The court below found that the owners had knowledge at the date of the lease of the contemplated improvements by Judson, the lessee, and that the lessor had no other or further notice or knowledge of the said intended improvements until after the liens were filed. The lessor posted no notice disclaiming responsibility.

On appeal this court held that the lease being a short one (six months), and the lessor being entitled thereunder, in a contingency, to the benefit of the improvements, and being a party thus interested, it had notice of circumstances sufficient to put a prudent man on inquiry as to the improvements which followed shortly thereafter, and was charged with knowledge thereof, etc.,—citing Civ. Code, § 19; *Moore* v. *Jackson,* 49 Cal. 109; *Gould* v. *Wise,* 18 Nev. 253, 259, 3 Pac. 30; *Santa Monica Co.* v. *Hege,* 119 Cal. 376, 51 Pac. 555. The validity of the liens against the lessor was upheld.

In *Santa Monica Co.* v. *Hege,* 119 Cal. 376, 51 Pac. 555, Hege, being the owner of a lot of land in the town of Santa Monica, upon which there was a dwelling house, verbally leased the same to one Naumann. Subsequently, Naumann

being in possession, obtained leave from his lessor to construct certain additions to the building, in the construction of which he purchased certain materials from the plaintiff, for the price of which a lien was taken. A judgment of foreclosure having been entered against the lessor, an appeal was taken to this court. It was here held "that the building was constructed with the knowledge of the appellant, and that his failure to give the notice required by section 1192, Code Civ. Proc., rendered his interest in the land subject to the lien." See, also *Santa Monica Co.* v. *Hege* (Cal.), 48 Pac. 69.

We think those cases are, in principle, on all fours with the case at bar. Here the agreement specially authorized, among other improvements on the mining claim, the sinking of a shaft. The lessors were to receive 25 per cent. of the gross output of the mine, and to that extent were interested therein. It is quite apparent that the appellants contemplated the working of the mine, and the making of such improvement was essential thereto. Having so consented, they must be deemed to have had notice of the contemplated improvements; and, having failed to disclaim liability by giving the notice as required by section 1192, the findings and judgment are correct, and we recommend that the judgment and order appealed from be affirmed.

BRITT, C., and BELCHER, C., concurred.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

TEMPLE, J., MCFARLAND, J., HENSHAW, J.

[1]Patrick B. McCarthy v. Edward W. Speed et al.

(11 South Dakota. 362; 77 N. W. 590. Supreme Court. December 21, 1898.)

Citizenship not contestable. Citizenship of one, and his rights to a mining claim dependent thereon, cannot be questioned in an action between him and other individuals to determine adverse claims to mining property.

[2]Location of lode within placer. The owner of an unpatented placer, claim, or another with his consent, can locate a lode claim within the boundaries of the placer claim.

Grantor estopped to deny discovery. Persons who locate a lode claim, and record their location certificate, are estopped, as against one to whom they sell an interest in the claim after an examination of the records, to assert that there was no discovery to support the location.

[3]Co-owner cannot relocate. One of the cotenants of a mining claim, who, on the annual assessment work thereon not being done, relocated the same, holds it as trustee for all the cotenants, notwithstanding Rev. St. U. S. § 2324, providing that on a failure to comply with conditions as to labor or improvements, the claim shall be "open to re-location in the same manner as if no location of the same had ever been made."

Forfeiture is not complete till a second party has acted on the default of a first party; and the co-owners of a possessory mining claim are in such privity of title that they cannot assert forfeiture against each other except by the statutory proceeding allowed when cotenants fail to contribute to the annual labor.

Appeal from Circuit Court, Pennington County; William Gardner, Judge.

[1]S. C. on second appeal, 20 M. R. —.

[2]*Mt. Rosa Co.* v. *Palmer*, 19 M. R. 696.

[3]The relocation by a party under fiduciary relations to the claim is void, or if benefit thereby accrues to the title, such benefit is for the original owner. *Lockhart* v. *Rollins*, 16 M. R. 16. *Book* v. *Justice Co.* 17 M. R. 617. *Turner* v. *Sawyer*, 17 M. R. 683. See *Utah M. Co.* v. *Dickert Sul. Co.* 6 Utah 183; 21 Pac. 1002.

Attempted relocation by vendee. *Minah Co.* v. *Briscoe*, 89 Fed. 891.

Attempted relocation for purpose of excluding cotenant is not abandonment. *Hulst* v. *Doerstler*, 11 So. Dak. 14; 75 N. W. 270.

Action by Patrick B. McCarthy against Edward W. Speed, administrator of William B. Franklin, deceased, and others. Judgment for defendants. Plaintiff appeals. Reversed.

CHARLES W. BROWN and MCLAUGHLIN & MCLAUGHLIN, for appellant.

JAMES W. FOWLER, LOOMIS S. CULL and FRED H. WHITFIELD, for respondents except Fayel.

W. O. TEMPLE and A. K. GARDNER, for respondent John J. Fayel.

HANEY, J. This action, brought for the purpose of determining adverse claims to certain mining property, was tried by the court, and resulted in a judgment wherein the claims of plaintiff are adjudged to be invalid. He appeals from such judgment and from an order denying a new trial.

From the findings of the trial court the following facts appear: On September 16, 1882, Jacob F. Reed and William Franklin located a portion of the ground in controversy as the Reed placer mining claim. From the date of location until 1892 Reed and Franklin were in actual, notorious, and peaceable possession of the claim, were acknowledged and reputed to be its owners, and during each year performed the required development work. They applied for patent November 23, 1892. Final entry was made March 13, 1893. There was no application for a lode on the placer site aside from the placer claim. The boundaries of the claim as patented coincide with its boundaries as staked upon the ground at time of location. January 25, 1888, Reed, Franklin, Thomas C. Blair, and Frank Eaton marked the boundaries of Tin Bar No. 1 claim upon the ground with stakes, as required by law, posted a discovery or location notice thereon, and within 60 days thereafter recorded a location certificate,

but did no other act of location at that time. The location or discovery notice of this claim was posted inside the boundaries of the Reed placer claim, and the point claimed as discovery on the Tin Bar No. 1 is the same point at which the notice was posted. No labor has been performed or improvement made upon the claim, except about four days' work in 1889, and about four days' work in 1891; such work not exceeding $14 in each of those years. There was no agreement on the part of defendants Blair or Franklin with plaintiff to perform labor or make improvements on Tin Bar No. 1 in 1893 or 1894, and no contractual relation existed between them in regard to such claim when the Holy Terror lode claim was located. January 25, 1888, Blair and Eaton did the same acts of location with respect to Tin Bar No. 2 that were done in respect to Tin Bar No. 1. No labor has been performed, or improvement made, upon Tin Bar No. 2, except about four days' work in 1891, of value not exceeding $14. There was no agreement on the part of defendants Franklin or Blair with plaintiff to perform labor or make improvements upon Tin Bar No. 2 in 1892, 1893, or 1894, and there was no contractual relation existing between them in regard to such claim during those years. Defendant Franklin located the lode claims Holy Terror and Keystone No. 4 on June 28, 1894, and September 20, 1894, respectively, and the law has been complied with, so far as it relates to those claims, since the date of each. Defendants are the owners of the Holy Terror and Keystone No. 4, save for the rights of the plaintiff in this action. No adverse was filed by plaintiff or other owners of either Tin Bar No. 1 or 2 to the application for patent to the Reed placer claim. At and prior to the time of the application for patent to the placer claim there was no known lode or vein thereon within the boundaries of either Tin Bar claim of such character as to render the ground more valuable because of its presence, or to justify the expenditure of money

for either exploitation or development. There was no application for patent to any lode or vein included in the placer claim in the application for patent to the placer claim. The Holy Terror embraces 1.62 acres of the ground covered by Tin Bar No. 1, and Keystone No. 4 embraces 2.71 acres of the ground covered by Tin Bar No. 2. In 1888, Eaton conveyed an undivided one-fourth interest in Tin Bar No. 1 and Tin Bar No. 2 to one George Williams, who, in the same year, conveyed the same interest to plaintiff and one Michael McGuire. On April 22, 1890, Eaton conveyed an undivided one-fourth interest in Tin Bar No. 2 to defendant Franklin, and Blair conveyed a like interest therein to Jacob F. Reed. When this action was commenced, Franklin (since deceased) and defendants Blair, Favel, and Amsbury each owned an undivided one-fourth interest in the Holy Terror claim, and an undivided seven thirty-sixths interest in Keystone No. 4. Blair acquired his interest in the Holy Terror claim with full knowledge of whatever rights the plaintiff had, if any. During 1891, Blair and Franklin discovered a well-defined ledge of mineral-bearing rock in place, carrying gold, upon Tin Bar No. 2, the point of discovery being outside the limits of Reed placer claim. The location notice on Tin Bar No. 1 was posted upon a well-defined ledge of rock carrying tin, but plaintiff and defendants had no knowledge of the existence of tin or other valuable deposit therein until during the trial of this action in the court below. There was no proof that the plaintiff is, ever was, or ever declared his intention of becoming, a citizen of the United States.

It will be assumed that the evidence sustains the findings of fact. Do they support the judgment? Defendants cannot question plaintiff's citizenship in this action. *Manuel* v. *Wulff*, 152 U. S. 505, 14 Sup. Ct. 651. It is the theory of plaintiff that he owned an interest in each of the Tin Bar lode claims upon which the annual assessment work was not done; that a portion of the ground covered by each

was relocated by his cotenant as the Holy Terror and Keystone No. 4; that such relocations were valid, but that the relocators should be adjudged to be his trustees to the extent of his interest in the Tin Bar claims. This theory necessarily involves the validity of the Tin Bar locations. It is contended by defendants that neither claim ever existed, for the reason that there was no actual discovery within its limits; that the Tin Bar No. 1 discovery notice was posted within the boundaries of the then subsisting unpatented placer claim; and that, if the Tin Bar location was originally valid, the claim ceased to exist when the placer claim was patented. It seems to be well settled that a stranger cannot locate a lode claim within the limits of another subsisting unpatented lode claim, but our attention has not been called to any decision which applies this rule to unpatented placer claims. In Mr. Lindley's recent work this language is found: "The policy of the government with reference to lodes is to sever them from the body of the public lands, and to deal with them and the land, immediately inclosing them as separate and distinct entities. The location of mining ground for placer purposes does not effect such severance. The placer claimant may, in the absence of a discovery and location by others, obtain the title to the lode, but he has not such right by virtue of his prior placer appropriation. This right to appropriate the lode must flow from the discovery of the lode. Whosoever first discovers the lode may appropriate it by complying with the laws conferring privileges upon such discoverers. If he fails to do so, it is open to the next comer; and this rule applies to the placer claimant as well as to strangers. If, having discovered it, he fails to manifest his intention to claim it by appropriating it under the lode laws, it may be the subject of appropriation by others, the same as if it were upon the public domain; provided, always, that such appropriation is made and perfected peaceably, and in good faith." 1 Lindl. Mines, § 413. However, this may

be with respect to strangers, there is certainly no reason for holding that the owner of an unpatented placer claim cannot locate a lode claim, or consent to such a location being made by others, within the boundaries of his placer claim. Under such circumstances it would hardly be logical to regard the placer owner as a trespasser upon his own premises, and, as we shall attempt to show hereafter, the defendants are estopped from questioning the validity of the Tin Bar claims to the injury of plaintiff.

We think the learned circuit court erred in concluding that the Tin Bar No. 1 claim was invalid in its inception because its point of discovery was within the boundaries of the placer claim. If the Tin Bar claims were located when application for patent to the placer was made, they were not affected thereby, no application for lodes having been included in the application for the placer patent. *Noyes* v. *Mantle,* 127 U. S. 348, 8 Sup. Ct. 1132; *Iron Silver M. Co.* v. *Mike & Starr M. Co.,* 12 Sup. Ct. 543. As to what constitutes a discovery within the meaning of the federal statutes has caused the courts no little trouble. It might be difficult to determine, in this case, from the findings of the trial court, whether any discovery was ever made upon either Tin Bar claim; but are these defendants in position to allege or prove, as against the plaintiff, that the declarations contained in the recorded location certificates were false, and that no discoveries were, in fact, ever made? We think not. Can the locators of these claims be heard to contradict their own recorded representations, to the injury of this plaintiff? It is disclosed by the evidence that plaintiff purchased his interest in the Tin Bar claims for a valuable consideration, after an examination of the records, relying upon the location certificates which were placed upon the public records by the locators for the purpose of selling the property as mining claims. Where one, by his conduct, intentionally causes another to believe in the existence of a certain state

of facts, and induces him to act on that belief, the former is estopped from averring against the latter the existence of a different state of facts at the same time. The locators of these claims, with actual knowledge of the facts, caused location certificates to be recorded, thereby representing that discoveries had been made on each, with the expectation and intention of inducing persons who might examine the records to believe that they were the owners of properly located mining claims. This conduct produced intended results. They sold an interest in the claims. Plaintiff examined the records, was induced to believe that the claims had been legally located, and acted on such belief. Whatever rights he has in this action depend upon the facts which the conduct of the locators induced him to believe existed when his interest in the claims was acquired. It would be a travesty on justice to permit the locators to now impair such rights by asserting that their recorded representations were false. Neither of the defendants is in any better position than the original locators, and all are estopped from denying the validity of the Tin Bar locations.

It being determined that, for the purposes of this action, the Tin Bar claims were valid in their inception, the main controversy is whether, when the annual assessment work has not been done upon a mining claim, one cotenant therein can relocate the same, and obtain title thereto, not only as against the world, but as against his cotenants. We are not aware that the precise question here presented has ever been decided by any court of last resort. It is well settled that cotenants stand in a certain relation to each other of mutual trust and confidence; that neither will be permitted to act in hostility to the other in reference to the joint estate; and that a distinct title acquired by one will inure to the benefit of all. This principle arises from the privity subsisting between parties having a common possession of the same land, and a common interest in the safety of the posses-

sion of each, and it only inculcates that good faith which seems appropriate to their relative position. *Venable* v. *Beauchamp*, 3 Dana, 321. It has been applied to mining property by the federal supreme court. In a case in that court, where one had acquired an interest in an unpatented claim by purchase at sheriff's sale, and obtained a patent to the entire property to the exclusion of another, who was found to own an interest therein, it was decided that the patentee held the title in trust for his cotenant; that a court of equity would enforce the trust; and that the excluded cotenant was not required to adverse the application for patent. *Turner* v. *Sawyer*, 150 U. S. 578, 14 Sup. Ct. 192. Therefore the only question to be determined in this connection is whether the relation of cotenant existed between plaintiff and Franklin when the latter located the Holy Terror and Keystone claims.

"A mining claim perfected under the law is property in the highest sense of that term, which may be bought, sold, and conveyed, and will pass by descent." *Belk* v. *Meagher*, 104 U. S. 279. Actual possession of the claim is not essential to the validity of the title obtained by a valid location, and until such location is terminated by abandonment or forfeiture, no right or claim to the property can be acquired by an adverse entry thereon with a view to the location thereof. *Belk* v. *Meagher, supra.* Abandonment is always a question of intention. In forfeiture the element of intention is not involved. It rests entirely upon the statute, and involves only the question whether the terms of the law have been complied with. Lapse of time, absence from the ground, or failure to work a claim for any definite period, unaccompanied by other circumstances, are not evidence of abandonment. Original locators may resume work at any time before relocation. Forfeiture is not complete until some one else has appropriated the property. 2 Lindl. Mines, 644; Rev. St. U. S. § 2324. Plaintiff and Franklin continued to be

co-tenants so long as the Tin Bar claims continued to exist. They continued to exist until the ground was relocated, and during every instant of that time the latter was, in law, incapable of performing any act in hostility to his co-tenant in reference to the joint estate. Franklin was plaintiff's co-tenant at the time he entered the boundaries of either Tin Bar claim for the purpose of relocating the ground. His entry for that purpose was hostile to his co-tenant unless he intended to relocate for the benefit of all the owners of the Tin Bar claims. It may be that he owed no duty to his co-tenants to represent the claims; it may be that he was at liberty to refrain from performing any act in reference thereto; but, if he elected to act at all, he was bound to act for the benefit of all the owners. His acts of relocation did not terminate the fiduciary relation between himself and plaintiff, because they were, if done for the purpose of defeating the rights of his cotenant in hostility to his interests, and, if they were not done for that purpose, they, of course, operated to the benefit of all the owners. We think the circuit court should have adjudged the defendants to be trustees, and have enforced the trust. This conclusion is not precluded by the language of the federal statutes. They provide that upon a failure to comply with required conditions as to labor or improvements "the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made." Rev. St. U. S. § 2324. It is contended that, if congress intended to have the relocator regarded as a trustee under any circumstances such intention would have been expressed in the statute. The contention is not tenable. The trust results from the fiduciary relation of the parties, and not from the operation of the statute. If such relation exists between an original locator and another, and he secures a patent, no one will deny that he may be adjudged to hold the property in trust for such person, or if a relocator sustains such relation to a third per-

son, the latter's rights may be enforced in equity. If this be true, there is no reason for making a different rule as to co-tenants. The relocator is permitted by the statute to acquire the property in the same manner that the original locator would have acquired it, but because of his relations to another who may be a co-tenant, a mortgagee, or person having no estate in the property, he will be adjudged to hold the title in trust for such person. In all cases of this character the trust depends upon the relation of the parties, not upon the manner in which title is acquired.

It is contended that the rule herein announced is contrary to public policy, and will result in endless embarrassment and confusion to a class of rights already sufficiently uncertain. We reply that a sound public policy always requires honesty and fair dealing. The federal statutes provide a most arbitrary and summary manner, commonly called "advertising out," in which one owner of a mining claim may compel his co-owners to contribute their share of assessment work, or cease to have any interest in the claim. An adequate method is thus provided for enforcing the rights of co-owners in respect to the development of mining property,—one that should satisfy the demands of all persons who desire to act fairly with their business associates.

It is urged in argument of counsel for appellant that the judgment below should be reversed, and the cause remanded with directions to enter judgment for plaintiff. This we think should not be done. All the facts upon which we predicate an estoppel are not contained in the findings of fact. This court cannot supply such facts, and without them the decision of the trial court would not sustain a judgment in favor of the plaintiff. The judgment and order denying a new trial are reversed, and a new trial ordered.

PROVIDENCE GOLD MINING CO. v. DENNIS A. BURKE.

(57 Pac. 641. Supreme Court of Arizona. January Term, 1899.)

An adverse claim suit is not an action at common law and is not therefore such an action as must in the territories be tried by a common law jury and a three-fourths verdict under Arizona statute may be received upon its trial.

Burden of proof on the relocator. Where one relocates a mining claim on the theory that a former location by another was forfeited by failure to do the necessary amount of work thereon, the burden is on him to prove such failure in an action by the former locator to determine the right of possession.

Implied admission of a prior location. A recital, in the location notice of a mining claim, that it is a relocation of another mining claim, is an implied admission of the validity of the former location.

[1]**Failure of last call in description to close.** A location notice of a mining claim is admissible in evidence, though the direction of the closing location line is indefinitely described, the location being sufficient in all other respects, and the proof showing that all the monuments were on the ground.

Indirect proof of citizenship. Evidence of declarations of one who cannot be produced as a witness at the trial that he was a citizen, that he had voted at territorial elections, that his name appeared on the election register, and that he had located mining claims under the declaration that he was a citizen of the United States, is admissible to prove such citizenship.

Location by citizen and alien. The fact that one of two joint locators of a mining claim is not a citizen of the United States, but the other is, does not invalidate the location, and a joint conveyance by them vests a valid title in the grantee.

Appeal from District Court, Yavapai County; before Justice R. E. Sloan.

[1]Description held good without naming county or state. *Talmadge* v. *St. John*, 129 Cal. 430; 21 M. R. —.

Whether the claim was sufficiently marked on the ground is a question of fact. *Farmington Co.* v. *Rhymney Co.* 20 Utah, 363; 58 Pac. 832. And the sufficiency of the certificate is a question of fact. *Fissure Co.* v. *Old Susan Co.* 22 Utah, 438; 21 M. R. —.

Neither the U. S. law nor Nevada require location notice to be recorded. *Peters* v. *Toponah Co.* 120 Fed. 587.

Action by Dennis A. Burke against the Providence Gold Mining Company. From a judgment for plaintiff, defendant appeals. Affirmed.

The appellant, the Providence Gold Mining Company, claiming to be the owner of mining locations situated in Yavapai county, called the "Hillside," "Yum-Yum," and the "Francis," made application for United States patent therefor in the land office in Prescott. The appellee, Dennis A. Burke, filed his contest in the land office on May 8, 1897, and within 30 days thereafter commenced proceedings in the district court of Yavapai county to determine the question of right of possession, in accordance with the provisions of section 2326, Rev. St. U. S. The three mining locations claimed by appellant adjoin each other, and in a general easterly and westerly direction. The Hillside lies in the middle, the Yum-Yum joins it on the westerly end with a strong deflection to the southwest, and the Francis joins the Hillside on the easterly end with a strong deflection to the northeast. Appellee

Construction of Montana statute requires that a location certificate must contain "the location and description of each corner with the markings thereon." *Walker* v. *Pennington*, 27 Mont. 369; 71 Pac. 156.

Instances of indefinite description.

The certificate is admissible however defective, under special act recognizing validity of claims held by possession in Alaska prior to 1884. *Bennett* v. *Harkrader*, 18 M. R. 244.

A record upheld whose only call was "about 1,500 feet south of Vaughn's Little Jennie Mine," and the claim's own stakes treated as valid monuments. *Hammer* v. *Garfield Co.* 16 M. R. 125.

The claim's own corners treated as sufficient monuments of description. *Talmadge* v. *St. John*, *supra*, and notes. *Contra*, *Purdum* v. *Laddin*, 23 Mont. 387; 59 Pac. 153.

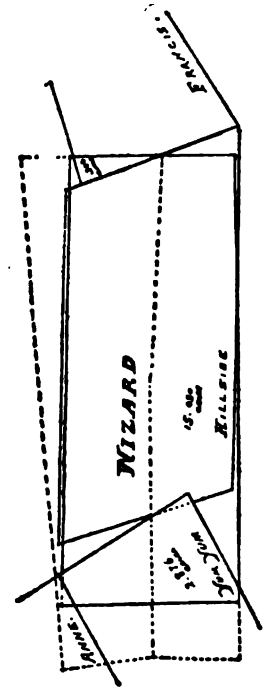
In *Darger* v. *Le Sieur*, 9 Utah 192; 30 Pac. 363, and *McEvoy* v. *Hyman*, 15 M. R. 397, the location certificates were held void for want of sufficient description.

A tie to its own stake and an adjoiner is sufficient description. *McIntosh* v. *Price*, 121 Fed. 716.

made allegation in his complaint that he was the owner of the Wizard mining claim. By a map filed as an exhibit with the complaint, he showed and alleged that the surface boundaries of the Wizard location were substantially those of the Hillside location, and that there was a conflict between the Wizard claim and the claims for which appellant was seeking patents to the extent of 2.876 acres on the Yum-Yum, 15.030 acres on the Hillside, and .304 acres on the Francis. The Wizard claim was located May 24, 1893, by A. L. Butler and Joseph McKeague, and came into possession of appellee by mesne conveyances. The Yum-Yum claim was located July 6, 1893, by A. E. Baker and A. B. Lewis. The Hillside was located January 1, 1896, by A. B. Lewis and Henry Johnson. The Francis claim was located January 1, 1896, by S. E. Mensinger. The three claims Yum-Yum, Hillside, and Francis came into possession of appellant by mesne conveyances. The Hillside claim, whose lines are substantially those of the Wizard claim, is a relocation of the Wizard claim, and is described in the location notice as "formerly the Wizard mining claim, as a forfeited claim." The answer of appellant, after making allegations of the locations of the several claims, further alleges, and urges as a defense, that the annual expenditure for the year 1895 was not made upon the Wizard claim, and that the same was forfeited. The cause was tried before a jury, who returned a verdict in favor of plaintiff, Burke, appellee herein. Judgment was rendered accordingly. The defendant appealed to this court, and assigned the following errors: Nos. 1, 2, and 3 relate to instructions to the jury. No. 4. That the court erred in permitting the introduction of the location notice of the Wizard claim to be read in evidence. No. 5. That the court erred in admitting the testimony as to the acts of location as to the Wizard claim. No. 6. That the court erred in admitting the deed from Joe McKeague, one of the locators, in evidence. No. 7. That the court erred in permitting any evidence to go to the jury as to

Joe McKeague's having voted at Big Bug in 1894, to prove citizenship. No. 8. That the court erred in overruling appellant's motion for an order and decree in favor of defendant notwithstanding the findings and verdict of nine of the jurors. No. 9. That the court erred in overruling appellant's motion in arrest of judgment. No. 10. That the court erred in overruling appellant's motion for new trial. No. 11 That the court erred in instructing the jury that under the law in this class of cases it is not required that a unanimous verdict be returned by the jury.

The following is a plat of the premises in question:



ANDREWS & LING and H. D. STOCKER, for appellant.

MORRISON & MORRISON, for appellee.

STREET, C. J. (after stating the facts). The last four assignments of error, numbered 8, 9, 10, and 11, may be grouped together. Counsel for appellant have made an exhaustive argument upon them, and have placed the errors there assigned in a prominent attitude. Grouped together, they relate to the rights of the parties to a trial by a common-law jury. The cause was tried before a panel of 12. The court instructed them that: "Under the law in this class of cases, it is not required that a unanimous verdict be returned by the jury. If, therefore, you do not unanimously agree upon a verdict, but three-fourths of you, or more, do agree upon a verdict, such verdict will be signed by your number constituting said three-fourths, or more, and returned into court,"—upon which instruction a verdict was returned, signed by but 9 of the jurors. Act No. 51, Sess. Laws Ariz. 1891, provides as follows (section 1): "That in all trials of civil cases and in all trials of misdemeanors in the courts of this territory, where a jury of twelve persons shall be empaneled to try such case, the concurrence of three-fourths (¾) of such jury shall be sufficient to render a verdict therein. And in all such trials, when the said jury of twelve persons shall unanimously agree upon a verdict, said verdict shall be signed by the foreman thereof, and returned into court; but where such jury do not unanimously agree upon a verdict, then said three-fourths of such jury shall sign the verdict so agreed upon by them, and notify the court of such fact, and thereupon all of said jury shall be returned into court, and shall then deliver to the court the verdict so signed by three-fourths (¾) of such jury; and the court shall receive and cause to be read and recorded such verdict in the cause, and judgment shall be entered thereon as in

other cases now provided by law. Provided, that in all trials of felony, the concurrence of twelve jurors shall be necessary to render a verdict." The act has already received a construction by this court in the case of *Carroll* v. *Byers,* 36 Pac. 499, where it was held that the act, "in so far as it applies to cases cognizable at common law, must be held invalid, because in conflict with section 1868 of the Revised Statutes of the United States, which authorizes in the territories a commingling of common-law and chancery jurisdictions in the territorial courts, and a uniform course of proceeding in all cases, legal or equitable"; and provides also (Supp. Rev. St. U. S. p. 13), "No party shall be deprived of a right to trial by jury in cases cognizable at common law." Similar statutes have been upheld in other territorial jurisdictions when not in conflict with section 1868, Rev. St. U. S., and its amendments. In the case of *Hess* v. *White,* 33 Pac. 243, the supreme court of Utah held that a statute providing that in all civil actions a verdict may be rendered by a concurrence therein by nine or more members of the jury was not in conflict with the constitution of the United States, "that in suits in common law, where the value in controversy shall exceed twenty dollars, the right to trial by jury shall be preserved" (Amend. art. 7); nor in conflict with section 1868, Rev. St. U. S., and its amendments, that "no party shall be deprived of the right to trial by jury in cases cognizable at common law." The supreme court of the United States, in the case of *Publishing Co.* v. *Fisher,* 166 U. S. 464, 17 Sup. Ct. 618, in discussing the validity of the Utah statute, only held that it was in conflict with the provisions of the constitution and statute heretofore cited in cases arising at common law; that the provisions of the constitution and the acts of Congress secured to litigants in common law actions the right to trial by jury in all its substantial elements. The same court, in the case of *Walker* v. *Railroad Co.,* 165 U. S. 593, 17 Sup. Ct. 421, in construing a territorial statute providing for

special issues to be found by a jury, held that it was within the power of a legislature of a territory to provide that on a trial of even a common law action the court may, in addition to the general verdict, require specific answers to inquiries; and, when a conflict is found between the two, render such a judgment as the answers to the special questions compel.

The question, then, as to whether the court committed an error in instructing the jury that a verdict could be rendered by three-fourths of their number, and by afterwards receiving a verdict signed by but nine of their number, can be settled by determining whether this particular action is a common law action. This action is on an "adverse" filed in the land office to contest the right of an applicant for United States patent. In *Doe* v. *Mining Co.*, 43 Fed. 219, the question was raised by demurrer as to whether an "adverse" was a law action or a suit in equity. The demurrer raised the point that the suit should be dismissed for the reason that the complaint showed upon its face that the plaintiff had a full, adequate, and complete remedy at law by the ordinary action in ejectment. The court, after discussing the common law actions for the recovery of land, decided that in the proceeding contemplated by the statute no such judgment could be rendered as was rendered in common law actions; that the proceeding there provided for has not for its object the recovery of possession of the mining ground, nor is possession made by the statute the test of either party's right; that the action could be maintained whether in or out of possession. "The sole object of the proceeding in court is the determination of the contest that arose in the land office, the point of which is, which of the applicants, if either, is entitled to receive the patent from the government? The right of possession referred to in the statute is not the right which flows from and is a part of the title of ownership of private land. It has no relation to such right, but it is the right which flows from a compliance with the laws prescribed by Congress for the

acquisition of a government patent for mineral lands. Such a right never was, and never could be, the subject of any common law action; and its determination, therefore, on the equity side of the court, cannot be, as argued for the defendant, a violation of that provision of the constitution which declares that the right of trial by jury shall be secured to all, and remains inviolate forever." In the case of *Rutter* v. *Mining Co.*, 75 Fed. 37, the two questions discussed were (1) whether such suits arise under the laws of the United States, and (2) whether they are at law or in equity; and, after discussing the first question, the court proceeds: "The remaining question, as one of practice, is important, and seems never to have been directly considered by the supreme court, but has been by a few other courts, whose decisions have been contrary. The statute [section 2326, Rev. St. U. S.] directs that when a party enters, in a local land office, his adverse claim to an application for patent to mining ground, he shall commence his proceedings in some court of competent jurisdiction to determine the question of 'the right of possession' to the ground in dispute, and, according to the judgment of such court, the rights of the parties are finally determined in the land office. By the act of March 3, 1881, this section is so amended that, if neither party shows title to the ground in controversy, neither will have judgment in his favor. So far as the court is concerned, it is a special proceeding, referred to its determination for the guidance of the land office, and the jurisdiction of the court in such cases is based upon prior proceedings in such office. The questions of title and patent for agricultural and other lands—similar matters—are determined by the local land office. The questions for consideration are such as may, if congress had so directed, be adjudicated without the aid of a jury. There is nothing in the nature of the questions involved that entitles any of the parties to a trial by jury, within the intent of the seventh constitutional amendment, for the whole proceeding, and

every part thereof, is nothing more than a procedure established by the government for the disposal of its lands; and certainly it cannot be claimed that the purchaser can demand a trial by jury to determine his claim to government lands. In all such contests it must be remembered that the government is an interested party so far as to see that the claimants have complied with the mining requirements before they get any title to the lands. The statutes and some decisions say that this action is to determine 'the right of possession' to the ground in controversy. If this were all, it might be determined by ejectment; but it is submitted that this is not 'all, and that the use of this expression in the statute is an inadvertence or an inaccuracy, for the entire import and object of the statute is to have determined the more important question as to who, if any one, is entitled to the patent. Frequently a party has a right to the possession, and not to the patent. He is entitled to the possession as soon as he duly locates a claim, but not to a patent until he shall have done the necessary work.' This action, then, is to find who is entitled to the conveyance from the government—from the trustee—for the land in controversy. Actions for conveyance of realty are essentially equitable. Again, whatever claim either party may have to the ground in controversy is based upon an equitable title alone, while the legal title remains in the government. Common law actions deal with legal, and not equitable titles." It was provided by section 2326, Rev. St. U. S., that the action was to be brought "to determine the question of the right of possession." The act of Congress of March 3, 1881 (21 Stat. 505), was an amendment thereto, "that if, in any action brought pursuant to section 2326 of the Revised Statutes, title to the ground in controversy shall not be established by either party, the jury shall so find, and judgment shall be entered according to the verdict." "In such cases costs shall not be allowed to either party, and the claimant shall not proceed in the land office or be entitled to

the patent for the ground in controversy until he shall have perfected his title." The supreme court of the United States, in the case of *Perego* v. *Dodge,* 163 U. S. 160, 16 Sup. Ct. 971, construed those provisions, and held that the act of March 3, 1881, was not intended to require and does not require, all suits under section 2326 to be actions at law, and to be tried by a jury. They decided that the determination of the right of possession as between parties is pursuant to statute, and in aid of the land office, and that the form of action was not provided for by the statute, and that either an action at law or suit in equity would lie, as either might be permitted under the particular circumstances. This court heretofore, in the case of *Jordan* v. *Duke,* 53 Pac. 197, in effect decided that, where both plaintiff and defendant to the action set forth fully the nature of their claims, and asked for relief, such action was in aid of the proceedings in the land office; and that a verdict could be rendered either for the plaintiff or defendant or for the government. We did not then go so far, nor do we now go so far, as to say that the government would have been concluded by a verdict in favor of either the plaintiff or defendant. The effect of a verdict in favor of the government would prevent either party from proceeding further in the land office in obtaining patent. In this action the parties, in their pleadings, set out at length their respective mining locations, and each asked for a judgment which, when filed in the land office, as provided by the statute, would have permitted them to have proceeded in the land office without molestation of the other. No execution would issue for the possession of the land, and no other effect would have been given to the judgment than to have cleared away the obstructions which had been placed against the application for patent in the land office,—purely a statutory remedy and statutory relief. That being the case it was not a common law action. The parties were not entitled, as a matter of constitutional right, to a verdict by a

common law jury. The jury, at best, was an advisory agent of the court, to enlighten its conscience, and not to control its judgment. Under the provisions of Act No. 51, Laws Ariz. 1891, the court did not commit an error in receiving the verdict of the jury signed by but nine of its members.

2. The first assignment of error is upon the following instruction: "And you are further instructed that the burden of proof is upon the defendant to show that the said O'Donnell failed to do the amount of $100 worth of work upon what is known as the 'Wizard Claim' in the year 1895." Under the issue this was not an erroneous instruction. The answer admitted the former location of plaintiff's Wizard claim. Defendant made his locations upon the same ground upon the apprehension and theory that plaintiff's Wizard claim had been forfeited, and made such allegation in his answer. In the case of *Hammer* v. *Mining Co.*, 130 U. S. 291-301, 9 Sup. Ct. 552, where the same question was decided, it was said: "As to the alleged forfeiture set up by defendant, it is sufficient to say that the burden of proving it rests upon him; that the only pretense of a forfeiture was that sufficient work, as required by law, each year, was not done on the claim in 1882, and that the evidence adduced by him on that point was very meager and unsatisfactory, and was completely overborne by the evidence of plaintiff [citing the case of *Belk* v. *Meagher*, 104 U. S. 279]. A forfeiture cannot be established except upon clear and convincing proof of the failure of the former owner to have work performed, or improvements made, to the amount required by law."

3. Assignments of error numbered 2 and 3 relate to instructions of the court to the effect that the location notice of the Hillside mining claim, containing, as it does, the assertion that the Hillside location is a relocation of the Wizard mining claim, makes an implied admission on the part of the defendant and its grantors of the validity of the location

of the Wizard. In the case of *Wills* v. *Blain*, 20 Pac. 798, the supreme court of New Mexico, in regard to a similar instruction, held that the same was good. They say: "The relocator, when he so describes himself in the notice, solemnly admits, in an instrument which is made a matter of record, that he is not a discoverer of mineral, but an appropriator thereof, on the ground that the original discoverer has forfeited his right. The notice becomes in some sense an instrument of title,—a record. It is the equivalent of an admission of record of an original locator that the locator claims a forfeiture by reason of the failure on the part of the first locator to make his annual expenditure. This we believe to be the doctrine of *Belk* v. *Meagher*, 104 U. S. 279, and on that authority sustained the instruction of the court below on that point." We need not take space in this opinion to insert the instructions given in this case and the instructions given in the case of *Wills* v. *Blain*, to compare them, but it will be sufficient for us to say that both use such language as, in effect, says that such a recital in the location notice of the relocated claim impliedly admits the validity of the prior location.

4. The fourth assignment of error is that the court erred in permitting the introduction of the location notice of the Wizard claim to be read in evidence, and specifies as the reasons (1) that the citizenship of the locators had not been shown, and (2) that the location was vague and indefinite. The reason why the location notice was claimed as vague and indefinite was because of the description of its exterior boundaries. The only point about which there is anything indefinite is in the direction of the closing location line. If the monument in the center of the claim is the point of beginning, the closing line would be a diagonal one from the southeast corner to the center of the claim. It was the evident intention of the locator to describe his closing line to meet the center side-line monument on the easterly side, which was described

as 300 feet from the point of commencing. In all other particulars the location is sufficient. The proof showed that all of the monuments were upon the ground. In the case of *Kinney* v. *Fleming,* decided by this court at the present term, and reported in 56 Pac. 723, a similar question arose as to the description of monuments. We there said: "It is true, the position of the monuments as built upon the ground was described in such a way as to direction as to be confusing; but, if the statutory requirements were complied with, the notice would be sufficiently correct to allow its admission as evidence when offered by the defendant."

5. The fifth assignment of error is that the court erred in admitting testimony as to the acts of location of the Wizard claim, and appellant argues the assignment of error upon the ground that the complaint did not state such facts in regard to the location as would warrant any evidence of the location notice. Without making a reference to the allegations in the complaint, we think it will be sufficient for us to say that appellant's contention in that particular cannot be sustained.

6. The remaining assignments of error, numbered 6 and 7, relate to the proof of citizenship of McKeague, one of the locators of the Wizard. At the trial, McKeague was absent. Plaintiff showed that he had used every effort to find his whereabouts, and to have him present at the trial, but McKeague was unable to be found, which fact compelled the plaintiff to resort to proof of McKeague's citizenship from other sources. Evidence was adduced to show he had made declarations of his citizenship to his friends and companions; that he had voted at the elections held in the territory of Arizona, and that his name had appeared upon the Great Register of Yavapai county; and that while he was a resident of Big Bug mining district, in Yavapai county, Ariz., he had performed many acts of locating mining claims, through a long number of years, under the declaration that he was a citizen of the United States. That such evidence is legiti-

mate, and tends to show citizenship, is sustained in the case of *Boyd* v. *Nebraska*, 143 U. S. 180, 12 Sup. Ct. 375. Anyway, plaintiff held and owned the Wizard mining claim by mesne conveyances from the joint locators, Butler and McKeague. It was strictly proven that Butler was a citizen, and Butler being a citizen of the United States, the fact that McKeague was not a citizen of the United States could not operate to defeat the rights of Butler, or to throw the whole claim open to relocation. McKeague's situation at the most would have been one of simple incapacity to hold, without the effect of making the location invalid, if the co-locator, Butler, was a citizen at the time the location was made. Butler and McKeague having joined in a conveyance, their deed transferred to the grantee a valid mining location, unaffected by the non-citizenship of one of the locators. The judgment of the district court is affirmed.

DAVIS and DOAN, JJ., concur.

WILLIAM WEBBER v. GOTTLIEB VOGEL.

(189 Pennsylvania 156; 42 Atl. 4. Supreme Court. January 2, 1899.)

[1]**Right of coal owner to carry other coal through his gangways.** The surface and mining estates being severed, one owning the coal and another the surface, the owner of the coal has the right to use the gangways through his stratum of coal for the transportation of coal from other mines.

Mineral exhausted, severed estate ceases. The owner of the estate in the coal severed from the surface title, is the owner not only of the coal but of the space which it occupied before removal in fee until the whole coal is exhausted after which event the estate determines and the surface owner holds the entire body of the land.

Appeal from Court of Common Pleas, Allegheny County.

Bill by William Webber against Gottlieb Vogel to enjoin defendant from hauling coal mined under adjoining premises, through a mine on plaintiff's premises. Decree for defendant, and plaintiff appeals. Affirmed.

E. G. FERGUSON, L. C. BARTON and J. S. FERGUSON, for appellant.

[1]A lessee has the right to work by instroke and it is workmanlike mining. *Lewis* v. *Fothergill*, 15 M. R. 271. *Jegon* v. *Vivian*, 8 M. R. 628. *Whalley* v. *Ramage*, 8 M. R. 52. *Taylor* v. *Thomas*, (Colo.) 71 Pac. 381. *Contra*, *Clear Creek Co.* v. *Comstock Co.* (Colo. App.) 68 Pac. 1060.

The opening to work need not be on the demised premises. *Moyers* v. *Tiley*, 8 M. R. 474. *Tiley* v. *Moyers*, 15 M. R. 261.

Working by instroke not an injury to be prevented by injunction. *Cons. Coal Co.* v. *Schmisseur*, 135 Ill. 371; 25 N. E. 795. But may be when contrary to terms of lease. *Rockafellow* v. *Hanover Co.* (Pa. Com. Pl.) 6 Kulp 507.

Owner of coal bed, by title severed from the surface title, has the right to work other coal by instroke. *Lillibridge* v. *Lackawanna Co.* 17 M. R. 412.

Lease of coal land with right of instroke for coal from adjoining lands, construed not to compel exhaustion of the demised coal

T. S. BROWN and W. G. STEWART, for appellee.

DEAN, J. Eliza Lewis and Eliza H. Lewis, being the owners in fee of about 15 acres of land in Wilkins township, Allegheny county, conveyed to Albert H. Sutton all the merchantable coal underlying it. From Sutton, by regular conveyance, the title to the coal became vested in one Jacob Weinman, who leased it to Gottlieb Vogel, the defendant. By the terms of the Lewis deed to Sutton, the latter was granted a right of way into, upon, and under the land, at such points and in such manner as might be necessary for purpose of mining the coal. The coal having already been worked to a considerable extent, he was further granted the right to use the tramways then in the mine, and the platform connected therewith.

On January 9, 1885, the Lewises conveyed 13 acres of this land, under which lay the coal, to William Webber, who, of course, took subject to the deed to Sutton. Jacob Weinman, the lessor of Vogel and grantee under the Sutton deed, also owned an adjoining tract of land underlaid with coal, which he had also leased to Vogel. Vogel, thus being lessee of the Weinman and Lewis coal, the seam being the same, and

before the right of instroke was exercised. *Genet* v. *Delaware Co.* 122 N. Y. 505; 25 N. E. 922.

The right to surface privileges for coal got by instroke allowed by implication from the right to mine it. *Id.*

Co-tenant, working by instroke enjoined. *Butte Co.* v. *Montana Co.* 24 Mont. 125; 60 Pac. 1039.

Defendant and plaintiff were co-tenants of a group of claims developed by a tunnel which defendant had extended into his own ground beyond: *Held*, that plaintiff was entitled to an injunction against his exclusion from the tunnel. *Peo.* v. *Dist. Court*, 27 Colo. 465; 62 Pac. 206.

Lessee continuing to hold shaft to get adjoining coals by instroke held for the rent. *Lennox* v. *Vandalia Co.* 158 Mo. 473; 59 S. W. 242.

Discussion of the right of surface owner to bore for oil through underlying coal belonging to another. *Chartiers Co.* v. *Mellon*, 152 Pa. 286; 25 Atl. 597.

persistent under both tracts, claimed the right under his lease of the Lewis coal to use a road or way over the surface of Webber's land in working the coal on the Weinman tract; and further claimed the right to transport, through the underground gangways in the Lewis tract, the rock and gob excavated on the Weinman tract, and deposit the same on the land of Webber, at the pit's mouth. Webber denied the right of Vogel, and brought trespass against him. The judgment was for plaintiff, which, on appeal to this court, was affirmed. 28 Atl. 226. Webber, claiming that his right was determined by the judgment in that case, filed this bill to restrain Vogel from transporting any of the coal mined in the Weinman tract under, through or over the Lewis tract; and from transporting any slack, refuse, or débris produced from the Weinman tract in the same way. The bill further prayed an injunction to restrain Vogel from the use of a ventilating shaft in proximity to Webber's house. The answer of defendant admitted the material facts averred by plaintiff, but he claimed the right to transport coal through the underground gangways of the Lewis land. The learned judge of the court below, noticing the conflict between the opinions in *Lillibridge* v. *Coal Co.*, 143 Pa. St. 293, 22 Atl. 1035, and *Webber* v. *Vogel*, 159 Pa. St. 235, 28 Atl. 226, came to the conclusion it was not the intention of this court in the latter case to overrule the former, and therefore sustained the defendant's contention, and dismissed the bill. Hence this appeal by plaintiff, who assigns for error the decree.

An examination of the questions at issue in *Webber* v. *Vogel, supra*, shows that the main contention there was as to the right of Vogel to deposit slack and refuse from the Weinman tract on Webber's land at the pit's mouth, and the right to haul coal over the surface of the same land to the Greensburg turnpike. If, in so doing, he trespassed on Webber, then what damage had the latter suffered? He complained that cultivation of his land had been interrupted by the hauling

over the surface, and a serious burden had been imposed by depositing the refuse of other coal mines upon it. The jury assessed his damages at $50. An examination of the charge of the court in that case shows that neither party considered the hauling of coal through the underground gangways as of much consequence. On the appeal the burden of complaint as to error was the failure of the court to instruct the jury that, if they found that one Kelly, a former owner of both tracts, who had opened the coal on both, had imposed a visible servitude of right of haulage over and under one tract in favor of the other, then Webber took his tract subject to such servitude, and could not recover. It was held by this court (opinion by Thompson, J.) that the principle invoked by appellant did not apply to the facts of the case, because, by the terms of Sutton's deed, the right to the coal carried with it only the right to haul under the one tract the coal mined from that tract. This question had not been raised in the argument; the verdict of the jury, on the evidence, as to the use of the surface for hauling and dumping of the refuse, amply established plaintiff's right to his judgment, and it might well have been rested on that, for it was clearly shown that both were trespasses. *Lillibridge* v. *Coal Co., supra*, was not mentioned in the opinion, and was not cited by counsel. It was not the intention of this court to overrule it. That case was argued, then held under advisement, and reargued before a full bench; after a most careful consideration, it was held by a majority of the court, in an exhaustive opinion by our Brother Green, that, in case of severance, the title of the lessee was an estate in fee simple in the coal, and while such estate existed the owner had the right to haul through the gangways coal mined from other and adjoining land. While there were three dissents from that judgment, we have since strictly adhered to the principles announced in it; for eight years it has stood as the law, and has become a settled rule of property in the great mining regions of the

commonwealth. In reliance upon it, capital has been invested, and mining corporations organized. We are not disposed to disturb it; would not, even if we doubted it. While this is our settled opinion, we do not intend that the rule in that case shall be extended beyond what was plainly decided. While there exists by the deed to the grantee an estate in fee simple in the severed coal, and his right to the space mined out will not be distinguished from that in which the coal remains unmined, that estate, except in very rare cases, has no badge of perpetuity. In nearly every case the instrument itself discloses the intention of the parties that the coal shall be mined; that is, that the subject of the grant shall soon be exhausted or consumed; it is severed from the under and over lying land for the purpose of turning it into money; it would not only be a perversion of the intention to merely use such an estate to reach other coal, but such use would be a continual menace to the stability of the surface; no owner of the upper land could tell when his estate would cease to be disturbed by workings underneath. It was intended to go no further in the case cited than to hold that, while the purchaser of the coal was in good faith mining out his coal, his right to the use of the space made vacant by his workings as they progressed could not be successfully obstructed by the owner of the surface; and not that by the purchase of the coal he obtained an undisputed and perpetual right of way under another's land. The owner of the land above and below has a right to the reversion of the space occupied by the coal within a time contemplated by the parties when they sever that peculiar part of the land from its horizontal adjoiners.

The decree is affirmed.

D. H. SISSON ET AL. v. ROBERT SOMMERS ET AL.

(24 Nevada 379; 55 Pac. 829. Supreme Court. January 14, 1899.)

Continued compliance with local rules required. To enable a party to maintain a right to a mining claim after it has been acquired, he must continue to comply substantially with the laws of Congress and of the state, and the local regulations of miners in force in the district where the claim is located.

[1]**Failure to comply works forfeiture.** A failure to comply with the laws and regulations in force in the district, whether national, state or local, works a forfeiture of the claim, whether such laws or regulations so provide or not, and the same becomes subject to location by any qualified locator.

The requirement of a discovery shaft or cut within 90 days after posting notice is not in derogation of the mining act which does not require annual labor during the location year.

The state cannot dispense with any mandatory requirement of the act of Congress, but it may add reasonable additional conditions.

[2]**First perfected location holds.** Where the required shaft was not sunk within the 90 days and a second party entered and perfected his location such second location holds the ground.

Appeal from District Court, Washoe County; A. E. Cheney, Judge.

[1]*Du Prat* v. *James*, 15 M. R. 341.

[2]Right of possession comes only from a valid location. *McKinstry* v. *Clark*, 4 Mont. 370; 1 Pac. 759. *Belk* v. *Meagher*, 1 M. R. 515. *Sweet* v. *Webber*, 7 Colo. 443; 4 Pac. 752. *Lalande* v. *McDonald*, 2 Idaho 283; 13 Pac. 347.

Prior possession will not defeat a valid location. *Noyes* v. *Black*, 4 Mont. 527; 2 Pac. 769. *Horswell* v. *Ruiz*, 15 M. R. 488. *Garfield Co.* v. *Hammer*, 6 Mont. 53; 8 Pac. 153.

He who complies with the law has the exclusive right. The fact of first discovery will not excuse the acts of location. *Gleeson* v. *Martin White Co.* 9 M. R. 435.

The party who is the first to comply with the law though he may not be the first discoverer holds the first title. *Lockhart* v. *Johnson*, 181 U. S. 527. *Copper Globe Co.* v. *Allman*, 23 Utah 410; 21 M. R. —. *Gregory* v. *Pershbaker*, 15 M. R. 602.

Action by D. H. Sisson and others against Robert Sommers and others. From a judgment for defendants, and an order denying a new trial, plaintiffs appeal. Affirmed.

WREN & JULIEN and GOODWIN & DODGE, for appellants.

ROBERT M. CLARKE, for respondents.

BONNIFIELD, C. J. This action was brought to recover damages of the defendants for the alleged wrongful entering upon the Morning Star mining claim, and extracting and removing therefrom large quantities of valuable mineral-bearing rock, and to obtain a perpetual injunction, restraining defendants from continuing the trespass. By the complaint the claim is particularly described by metes and bounds, and as being situated in Olinghouse cañon, White Horse mining district, Washoe county, State of Nevada, and it is alleged, among other things, that the plaintiffs were, are now, and ever since the 24th day of May, 1897, have been, the owners, in the possession, and entitled to the possession, of said mining claim.

The answer puts in issue all the material allegations of the complaint, and alleges all the facts necessary to constitute a valid mining location by the defendants, December 22, 1897, of the mining ground described in the complaint, and named by defendants the "Folorn Hope Vein." And it is alleged that the defendants are the owners, in the possession and entitled to the possession, of said mining claim. The sufficiency of the evidence on the part of the defendants is not questioned by the plaintiffs, except that it is claimed that the ground was not subject to location by them.

The case was tried by the court sitting without a jury. The trial resulted in a judgment for the defendants. The plaintiffs appeal from the judgment, and from the order of the court denying their motion for new trial.

The plaintiffs' claim to said mining ground is based upon a location thereof claimed to have been made the 22d day of May, 1897, by one of the plaintiffs, and they introduced evidence to prove the performance of every act necessary to constitute a valid location, and every condition requisite to continue the right acquired thereby, under the laws of congress and of this state. The sufficiency of such evidence in every material particular was contested at the trial, and is assailed by counsel of defendants on appeal, by elaborate argument, while counsel for plaintiffs maintain the sufficiency of the evidence to prove every material fact by like argument.

As we understand it, the court found for the plaintiffs on all the facts except as to the doing of the discovery work prescribed by St. Nev. 1897, p. 103, which provides: "Sec. 2. Before the expiration of ninety days from the posting of such notice upon the claim the locator must sink a discovery shaft upon the claim located to the depth of at least ten feet from the lowest part of the rim of such shaft at the surface, or deeper if necessary, to show by such work a lode deposit of mineral in place. A cut, or cross cut, or tunnel which cuts the lode at a depth of ten feet, or an open cut of at least ten feet in length along the lode from the point where the lode may be in any manner discovered, is equivalent to a discovery shaft."

The court found, in effect, that the discovery work done by plaintiffs within the 90 days was not sufficient under said statute, and that no further work was done by the plaintiffs prior to the entry of the defendants upon said mining claim on the 22d day of December, 1897.

As conclusion of law the court found that the plaintiffs' location of the Morning Star mining claim was not completed prior to the entry of the defendants, on account of the lack of the amount of discovery work required by said statute, and gave judgment for defendants accordingly. Counsel

argue and urge that the work performed by the plaintiffs was a substantial compliance with said statute. By stipulation of the parties the judge of the trial court visited the mining claim to determine from actual inspection and observation the sufficiency of the discovery work done by the plaintiffs, and to determine all other disputed matters of fact so far as the same might be determined by such examination.

We do not consider that we are warranted by the evidence to disturb the finding of such facts by the court. The validity of the provisions of said statute with reference to discovery work is directly involved in this case, and presented for determination on this appeal. The determination of this question will dispose of the case, and we do not deem it material to consider or pass upon the many other questions discussed by counsel.

In Colorado and several other states the work as specified in the Nevada statute is required to be performed as a prerequisite to the completion of a location. The same character of work is required in other states, but it is not made, in terms at least, necessary to complete a location, but rather, as we think, a condition to the continuance of the right acquired by location.

We regard it as entirely immaterial whether, under state legislation in reference to discovery work, the performance thereof be regarded as a necesary act of location, or as a condition to the continuance of the right after location. If such legislation is valid in the one case, it is in the other.

In *Erhart* v. *Boaro,* 113 U. S. 527, 5 Sup. Ct. 560, the supreme court of the United States recognized the validity of the Colorado act regarding such discovery work. We regard that case as sufficient authority on the subject. Many cases maintaining the validity of such state legislation are cited by Barringer and Adams in their work on the Law of Mines and Mining.

To enable a party to maintain a right to a mining claim

after the right is acquired, it is necessary that the party continue substantially to comply, not only with the laws of congress, but with the valid laws of the state and valid rules established by the miners, in force in the district where the claim is situated upon which such right depends. Failure to comply with such laws and rules works a forfeiture, whether the laws and rules provide for forfeiture for noncompliance or not, and the mining claim becomes subject to location by any qualified locator. *Mallett* v. *Mining Co.*, 1 Nev. 188; *Oreamuno* v. *Same*, Id. 215; Barring & A. Mines, 300.

Counsel for appellants admit that the state legislature may regulate the mode of acquiring and maintaining possession of mining claims, provided that the legislation is not in conflict with the laws of the United States, but contend that, as the act of congress gives the locator of a mine one year at least after he has made his location to do the required amount of work in order to hold it, an act of the legislature limiting the time is in conflict with the act of congress. They say, "although, under this provision of the act of congress, the legislature would be authorized, no doubt, to require locators to do more than one hundred dollars' worth of work annually, but not to limit the time within which it should be done."

The contention that, although the legislature may properly require a greater amount of work than congress has prescribed, it cannot limit the time in which to do it, does not strike us with any great force of reason. Congress has made the $100 worth of labor the minimum amount to be done, and the time named is the maximum time for the performance of the work without the risk of forfeiture. We think the legislature may require a reasonable additional amount of work to be done annually, and a reasonable amount of work to complete the location (113 U. S. 527, 5 Sup. Ct. 560), or, after location, a reasonable additional amount of work within a reasonable time, less than the time named by congress for the annual expenditure, as a condition to

the continuance of the right acquired by location of the mine.

"The state may not, by its legislation, dispense with the performance of the conditions imposed by national law, nor relieve the locator from obligations of performing in good faith those acts which are declared by it to be essential to the maintenance and perpetuation of the estate acquired by location. Within these limits the state may legislate." Lindl. Mines, § 249. "No state has the right to decrease the amount of labor which congressional law requires to be done annually on a mining claim. The law clearly implies that the states and territories, or the district organizations in the absence of state or territorial legislation, may increase the amount of such labor." Id. § 250.

The congressional law, we think, as clearly implies that the states and territories may require a reasonable amount of work to be done within a reasonable time after location independently of the annual assessment work prescribed by congress.

We are aware that the policy of the Nevada statute is questioned by many miners and prospectors, but the courts are not to question such policy. The question of policy is solely for the legislative department to determine.

The judgment and order appealed from are affirmed.

WILLIAM H. SANDERS ET AL. v. D. H. NOBLE ET AL.

(22 Montana 110; 55 Pac. 1037. Supreme Court. January 31, 1899.)

[1]**Right to swing claim.** The discoverers of the Never Sweat posted their notice claiming 500 feet southerly and 1,000 feet northerly. During the 90 days allowed to perfect location other parties discovered the Yukon. They had read the Never Sweat notice and purposely kept clear of its ground. Before the 90 days had expired the Never Sweat locators returned and placed their stakes and made their record so as to take in a large part of the Yukon claim. *Held*, that that they had the right to swing their claim as they pleased within the 90 days and were not estopped by their notice.

Appeal from District Court, Jefferson County; M. H. Parker, Judge.

Action by William H. Sanders and others against D. H. Noble and others. There was a judgment for defendants, and plaintiff appeals. Reversed.

LEW L. CALLAWAY, E. B. HOWELL and E. W. HARNEY, for appellants.

J. S. SHROPSHIRE and M. P. GILCHRIST, for respondents.

[1]This is apparently the only case where a locator having fixed his distance was allowed to swing his claim beyond that distance and cut out an intervenor. It cites but does not follow *Erhardt* v. *Boaro*, 113 U. S. 527; 15 M. R. 472, a controlling authority on the point as far as it goes. A later case in the same court, *Bramlett* v. *Flick*, 23 Mont. 95; 20 M. R. — does expressly follow the *Boaro case*. See 1 Snyder § 394; Mining Rights, 11th Ed. p. 38.

A locator may swing his claim at will where no conflicting discoverer has intervened. *Duncan* v. *Fulton*, 15 Colo. App. 140; 20 M. R. —.

Where a discoverer marks on the ground the center of his end lines he cannot change them to the injury of an intervening party though within his period to perfect his location. *Wiltsee* v. *King Co.* (Ariz.) 60 Pac. 896.

HUNT, J. Plaintiffs (appellants here) sued the defendants (who are the respondents) to enjoin certain trespasses upon the Never Sweat lode claim, and to enjoin them from asserting title to any portion of said claim, the ownership and possession of which plaintiffs allege to be in themselves. Defendants denied the ownership and possession of plaintiffs, and the validity of the Never Sweat location, set up their own title to the Yukon lode claim, and prayed that the same be quieted in themselves. The trial was had before a jury, and testimony was heard on both sides. At the conclusion of the plaintiffs' rebuttal testimony, the defendants moved the court to instruct the jury to find in defendants' favor. The court granted the motion. Verdict and judgment were rendered in defendants' favor. Plaintiffs appeal from the judgment and an order overruling a motion for a new trial.

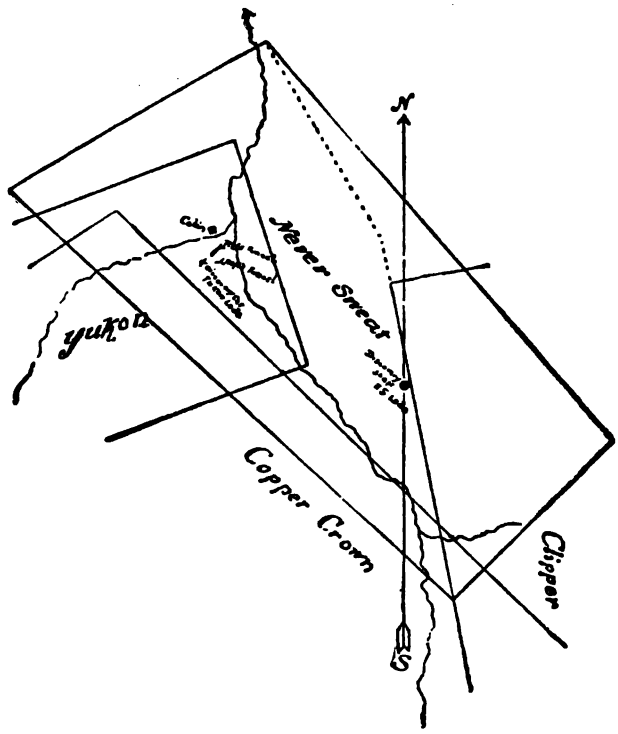
The ground of the defendants' motion to direct a verdict was that the plaintiffs had failed to make any proof of a compliance with the statute in respect to disclosing a well-defined crevice at the point of discovery of the Never Sweat claim for the depth of 10 feet. The court, however, did not sustain the motion upon the ground included therein, but held that defendants were entitled to a verdict because the plaintiffs were bound strictly by their location notice, and that, the plaintiffs having infringed upon the defendants' claim, they must be held to the lines of their location notice, and could not "get off onto some adjoining claimant's claim," and that, if they made a mistake, the prejudice lies at their door, and not at the door of the other parties upon whose rights they have infringed. To make the ruling of the court intelligible, and state the case on its merits, it is necessary to briefly recite what the evidence tended to show:

In August, 1897, W. H. Sanders, Henry Knight, and J. W. Knight, three of the plaintiffs, were working and prospecting in the vicinity of the ground in controversy. They were co-owners in the Copper Crown lode claim, which lies

in a southwesterly direction, and adjacent to the Never Sweat. In a northeasterly direction from the Copper Crown there was an unappropriated triangular tract, approximately 600 by 900 feet. Plaintiffs, after endeavoring to trace float rock, finally succeeded, and followed the same up the hillside, where they commenced to dig, and found what appears to be the apex of the Never Sweat lode. On August 7th they made their discovery. They dug down about 2 feet, and on the surface cut a hole about 2½ by 3 feet, finding in the hole what one of the plaintiffs says was a ledge of quartz, in a northerly and southerly direction, as near as he could tell. This ledge was traced by the float on the surface, but there was no outcropping on either side of the hole. On August 7th, Sanders and Knight, for themselves and the other plaintiffs, posted a notice of location at the point of discovery. It was in the usual form of location notices. It named the quartz claim as the "Never Sweat," and continued as follows: "Extending along said vein or lode five hundred feet in a southerly direction and one thousand feet in a northerly direction, from the center of the discovery shaft (at which shaft this notice and statement is posted), and three hundred feet on each side from the middle or center of said lode vein at the surface; comprising in all fifteen hundred feet in length along said vein or lode, and six hundred feet in width." Plaintiffs testified that, when they made this discovery, they intended to take the fraction above referred to, and supposed that their claim was running pretty near north and south. After putting up this notice of location of the Never Sweat, plaintiffs left that vicinity entirely, to fulfill a contract elsewhere, and were gone about 30 days. During their absence, the defendants, in August, went upon the ground involved in this controversy, and located the Yukon mining claim. One of the locators testified that he found some rich float on August 28th; that they saw the notice which was posted at the Never Sweat, and read it. Desirous

of avoiding the locating of any ground unless it was vacant, the defendants started from the location of the Never Sweat, and went due north, determining where due north was by the shadow of the sun about noon of the day they made their location. After measuring due north about 350 feet, they measured 300 feet down the hill, and concluded that they had about reached the side line of the Never Sweat. Then they measured 50 feet more, to allow the Never Sweat locators room "to swing their claim a little; we thought 50 feet was enough." Then they measured 150 feet from their discovery, and located the Yukon claim easterly and westerly. Defendants ran a tunnel to the vein disclosing the same at a depth of 10 feet or more. They explored and concluded their staking within a period of 30 days after the posting of the Yukon notice. They filed a declaratory statement with the county recorder of Madison county within 90 days, but the date of filing such statement was subsequent to the filing of the plaintiff's declaratory statement. When the plaintiffs got back to the Never Sweat, the defendants had completed the work of locating the Yukon, and had gone. Plaintiffs sunk a 10-foot shaft, established corner monuments, and recorded their declaratory statement of their location of the Never Sweat, all within 90 days after the posting of their notice as aforesaid. When they staked their claim, they located parallel to the Copper Crown, and included the discovery cut of the Yukon, which was 700 feet from the discovery point of the Never Sweat. The plaintiffs and the defendants had some conversation in relation to the conflicts, but it never resulted in any agreement between them. Plaintiffs also commenced to run a tunnel some 27 feet north of the mouth of the defendants' tunnel, and prosecuted this work until they tapped the vein claimed by defendants as the Yukon, about 12 feet at the head of the defendants' workings. This work was done after they had staked their claim so as to include the point referred to. Then plaintiffs notified the defendants to keep

off the ground. The defendants refused, and both plaintiffs and defendants continued to work until suit was brought. The accompanying diagram illustrates the ground in question.



The respondents contend that there was no sufficient discovery made of any mineral, lode, or vein at the time the Never Sweat was located, and for that reason the Never Sweat location was void. We are advised, however, upon argument in this court, that the learned judge of the district court did not pass upon this question raised by the motion of the respondents. It is here conceded that his decision was based solely upon the right of the locator of a mining claim to swing his claim within the statutory period of 90 days after the date of his discovery and notice thereof, and that

he passed upon no other point. Under the circumstances, therefore, we do not feel called upon to positively decide whether the location of the Never Sweat was absolutely void or not, for lack of sufficient discovery. There was considerable testimony of miners and others introduced upon this point by both sides, and, for the purposes of the present appeal, we shall hold that there was enough of a showing made by the plaintiffs to entitle them to stand upon the discovery as a valid one, within the meaning of the statutes of the United States and the state. One of the plaintiffs testified that, in making the location, they dug a hole, and found ledge matter, and a well-defined lead, which averaged from 12 to 18 inches wide; that the quartz was white, such as is found in that vicinity. Other witnesses testified that there was a vein in the shaft of the Never Sweat; that it dipped to the west; that it laid so flat that it only disclosed a hanging wall at the northwest corner of the shaft, and that on the lower side there was a foot wall; that the rock was in place, and that the vein was such as a miner would be willing to follow in the expectation to find ore of commercial value, and that it assayed from $2.40 to $3.20 in different portions thereof. These facts are sufficient to show that the location was made in good faith; and, at least until the district court shall hold otherwise, we think plaintiffs proved a compliance with the provisions of section 2320 of the Revised Statutes of the United States, requiring that there be a discovery of a vein or lode within the limits of the claim, before a valid location thereof can be made. *McShane* v. *Kenkle,* 18 Mont. 208, 44 Pac. 979, and authorities therein cited; *Shoshone Co.* v. *Rutter,* 31 C. C. A. 224, 87 Fed. 801.

Passing, then, the question of a sufficient discovery, we address ourselves to the requirements concerning the marking of mining claims so that the boundaries can be readily traced, and to a consideration of the demands of the federal statutes bearing upon the possessory rights to mining locations.

Section 2324, Rev. St. U. S., provides: "The location must be distinctly marked on the ground so that its boundaries can be readily traced. All records of mining claims hereafter made shall contain the name or names of the locator or locators, the date of the location, and such a description of the claim or claims located by reference to some natural object or permanent monument, as will identify the claim." This statute does not require a description of the claim to be included in the notice of location; nor does the United States demand more than that the claim shall be distinctly marked upon the ground, so that its boundaries can be readily traced. The simple requirements of the laws of the United States have led courts to regard the mining laws as beneficial,—to be liberally, not technically, construed; to be expounded with as little differentiation as may be between former known actual customs of miners and the formulated expressions of Congress based upon those customs in present positive law. Justice Bach in *Upton* v. *Larkin,* 7 Mont. 449, 17 Pac. 728, said:

"What are the two chief requirements of the statutes as far as the possessory right is concerned? (1) Discovery; (2) the marking of the claim upon the ground so that the boundaries can be readily traced. The first requirement is made for the benefit of the United States, so that the land cannot be acquired under this law until its character is first ascertained to be mineral. The second is made in order that those going upon the ground may know that others have acquired and claim title thereto. Certainly, these steps are very simple. The intricacies are those found by the courts of the states and territories wherein mineral lands are situated."

We find certain statutory provisions included in the Codes, consistent, apparently, with the laws of the United States, and supplementary thereto. The portions of the statute pertinent to the case at bar are as follows:

Sec. 3610 (Political Code). "Any person, a citizen, * * *

who discovers a vein or lode bearing gold, silver, * * * may locate a claim upon such vein, lode or deposit, by defining the boundaries of the claim in the manner hereinafter described, and by posting a notice of such location at the point of discovery, which notice must contain: (1) The name of the lode or claim; (2) the name of the locator or locators; (3) the date of the location; (4) if a lode claim, the number of lineal feet claimed in length along the course of the vein each way from the point of discovery, with the width on each side of the center of the vein, and the general course of the vein or lode as near as may be.

Sec. 3611. "Before the expiration of ninety days from the date of posting such notice upon the claim, the locator or locators must sink a discovery shaft upon the lode or claim to a depth of at least ten feet from the lowest part of the rim of such shaft at the surface, or deeper if necessary to show a well defined crevice or valuable deposit. Its equivalent in work must be done upon placer claims. A cut, a crosscut or a tunnel, which cuts a lode at the depth of ten feet below the surface, or an open cut of at least ten feet in length along the lode from the point where the lode may be in any manner discovered, is equivalent to a discovery shaft. The locator or locators must define the boundaries of his or their claim by marking a tree or rock in place, or by setting a post or stone at each corner or angle of the claim," etc.

Sec. 3612. "Within ninety days of the date of posting the location notice upon the claim, there must be filed in the office of the county clerk of the county in which the lode or claim is situated, a declaratory statement, which must contain: (1) The name of the lode or claim; (2) the name of the locator or locators; (3) the date of location, and such description of the location of said claim with reference to some natural object or permanent monument as will identify the claim; (4) if a lode claim, the number of lineal feet claimed in length along the course of the vein each way from the point

of discovery, with the width on each side of the center of the vein, and the general course of the lode or vein as near as may be; (5) if a placer or mill site claim, the number of acres or superficial feet claimed; (6) the dimensions and location of the discovery shaft, or its equivalent, sunk upon lode or placer claims; (7) the location and description of each corner, with the markings thereon.

"Such declaratory statement must be verified by the oath of the locator, or one of the locators, and in case of a corporation by an officer thereof duly authorized to act."

Appellants' position is that, under these state statutes a claimant has 90 days after posting notice of location within which to define the boundaries of his claim, and that the course of the lead as given in the posted notice is but preliminary, and not binding upon the locator. Respondents, on the other hand, insist that, although a locator has 90 days within which to complete his location, nevertheless the statute does not and could not extend the time within which a locator must mark the ground so that its boundaries can be readily traced, as required by the United States statute; in other words, a distinction is sought to be drawn between the federal statute as to marking the ground so that the boundaries of the claim can be traced, and the state statute allowing 90 days within which to stake the claim, record the notice, and perfect the location.

Taking up the statutes quoted, it will be seen that, to initiate and complete a mining location, five acts must be performed: (1) There must be a discovery; (2) there must be a definition of boundaries, as required by section 3611; (3) there must be a posting of notice at the point of discovery; (4) there must be development within 90 days from the date of posting the required notice; (5) there must be a declaratory statement filed in the office of the county clerk.

The first essential was performed so far as the case now

presents itself; and, it having been complied with by immediately thereafter placing at the point of discovery a notice as required by statute, we believe that, until the expiration of 90 days thereafter, the plaintiffs' claim was valid and subsisting. All persons were warned of the claim of the Never Sweat lode, and, by the law, prospectors or others going within the limits included within the notice, to locate another claim, were trespassers. Coming after the discovery made, it was an appropriation of the land specified therein; and the two acts—discovery and posting the notice—constituted the origin of a good title to the Never Sweat mining claim. The condition of a continued ownership was development and a definition of boundaries, by marking a tree or rock in place, or by setting a post or stone at each corner or angle of the claim, as set forth in section 3611, supra.

In the interpretation of statutes substantially like ours, we have the repeated adjudications of both federal and state courts, the more important of which we here collate:

In 1874 the legislature of Colorado enacted that the discoverer of a lode should have 60 days from the time of the uncovering or disclosing a lode to sink a discovery shaft thereon, and should have three months in which to record his claim by a location certificate. Mills' Ann. St. §§ 3150, 3155. Our statutes are generally similar to the earlier laws of Colorado. Morr. Min. Rights, 9th Ed. p. 25 (11th Ed. 28).

In *Erhardt* v. *Boaro,* (decided in 1881), 8 Fed. 692, the construction of the Colorado statutes came before the circuit court of the United States for the district of Colorado. The case there was this: Plaintiffs while prospecting, discovered mineral, and set up their discovery stake, containing the name of the Hawk lode, the date of the discovery, the name of the discoverers, and other matters, substantially as required by law. Thirteen days thereafter, the defendants pulled up the stake, threw it away, took possession, went to work in the same hole, and, having sunk the shaft to the required depth,

made a location of the claim. The plaintiffs there contended that they were the discoverers of the lode, and that they had 60 days under the law in which to complete the sinking of their prospect shaft and make their formal location. Defendants contended that plaintiffs were not in actual possession between the time they set their stake and the time defendants entered, and, furthermore, that the notice upon the discovery stake of plaintiffs was not sufficient, in that it failed to give the course of the lode. Justice Miller used the following language:

"The law of the state gives sixty days after making discovery of mineral in which to sink a shaft ten feet in depth. The main object of the sixty-days possession, it seems to the court, must be to allow time to discover the course of the lode, in order that the location may be made thereon. Counsel for defendants made an ingenious argument to show that the locator during those sixty days, to hold his right, must remain in continuous actual possession of the ground. The court does not so hold. If the discoverer put up a stake at the discovery, giving the name of the lode, date of discovery, and notice of his intention to locate the claim, this is equivalent to actual possession; otherwise, the statute serves no useful purpose. The intention of the statute must be that the setting up of the discovery stake, with the notice thereon, as required, is equivalent to actual possession for the sixty days, within which he may proceed to the next step, to wit, sink the discovery shaft to the depth of ten feet, have survey made, mark the lines, and make formal location."

The supreme court of the state of Colorado, in *Armstrong* v. *Lower,* 6 Colo. 581, in 1883, used the following language: "Under the federal and state statutes, two kinds of possession of mining ground are recognized: First, where the miner, by virtue of work and improvements upon a tract of mineral land, and occupancy thereof, holds the same independent of location statutes against one having no better right; secondly,

where, after discovering a vein, the miner undertakes to avail himself of the benefits of the location statutes. The law gives him possession of his entire claim as marked upon the surface for the period of ninety days from the date of discovery, provided he post his discovery notice, and, within sixty days next after such date, sink his discovery shaft. Having perfected his location by a full compliance with the requirements of the statutes, his possession of the entire claim remains until he does or omits to do something which, in law, amounts to an abandonment thereof."

Erhardt v. *Boaro, supra,* was determined by the supreme court of the United States on appeal (113 U. S. 527, 5 Sup. Ct. 560), in 1885, and the views that had been expressed by Justice Miller from the circuit court were affirmed through Justice Field. The Hawk lode, involved in that case, was claimed by the following notice, posted at the point of discovery: "Hawk Lode. We, the undersigned, claim 1,500 feet on this mineral-bearing lode, vein, or deposit. Dated June 17, 1880. Joel B. Erhardt, 4-5ths; Thomas Carroll, 1-5th."

After holding that the notice on the stake placed at the point of discovery contained a sufficient specification or description of the ground claimed by the locators, the court expressly held that the statute of the United States allows a discoverer to locate a claim upon a lode or vein to the extent of 1,500 feet, and that Erhardt's notice informed all persons subsequently seeking to excavate and open the lode or vein that the locators claimed all that the law permitted them to take. The notice was regarded as indefinite, simply, however, in not stating the number of feet claimed on each side of the discovery point, but that, as a notice of discovery and original location, it was sufficient. The court goes on to say:

"Greater particularity of description of a location of a mining claim on a lode or vein could seldom be given until

subsequent excavations have disclosed the course of the latter. These excavations are to be made within sixty days after the discovery. Then the location must be distinctly marked on the ground, so that its boundaries can be readily traced, and, within one month thereafter,—that is, within three months from the discovery,—a certificate of the location must be filed for record in the county in which the lode is situated, containing the designation of the lode, the names of the locators, the date of the location, the number of feet claimed on each side of the center of the discovery shaft, the general course of the lode, and such a description of the claim, by reference to some natural object or permanent monument, as will identify it with reasonable certainty. Rev. St. U. S. § 2324; Gen. Laws Colo. §§ 1813, 1814.

"But during the intermediate period, from the discovery of the lode or vein and its excavation, a general designation of the claim by notice, posted on a stake placed at the point of discovery, such as was posted by Carroll, stating the date of the location, the extent of the ground claimed, the designation of the lode, and the names of the locators, will entitle them to such possession as will enable them to make the necessary excavations and prepare the proper certificate for record. The statute of Colorado requires that the discoverer, before a certificate of location is filed for record, shall, in addition to posting the notice mentioned at the point of discovery, sink a shaft upon the lode to the depth of at least ten feet from the lowest part of such shaft under the surface, or deeper, if necessary to show a defined crevice, and to mark the surface boundaries of the claim. Before this work could be done by the plaintiff and his co-locator, the ground claimed by them was taken possession of by the defendants; the stake at the point of discovery, upon which the notice was posted, was removed; and Carroll was thereby, and by threats of violence, prevented from re-entering upon the premises and completing the work required to perfect the location and pre-

pare a certificate for record,—at least, the evidence tended to establish these facts. If they existed,—and this was a question for the jury,—the plaintiff was entitled to recover possession of the premises. To the extent of seven hundred and fifty feet on the course of the lode on each side from the point of discovery, he and his co-locator were entitled to protection in the possession of their claim. They did not lose their right to perfect their location, and perform the necessary work for that purpose, by the wrongful intrusion upon the premises, and by threats of violence if they should attempt to resume possession. As against the defendants, they were entitled to be reinstated into the possession of their claim. They could not be deprived of their inchoate rights by the tortious acts of others; nor could the intruders and trespassers initiate any rights which would defeat those of the prior discoverers."

Further on in the opinion it is laid down that, whenever preliminary work is required to define and describe the claim located, the first discoverer must be protected in the possession of the claim until sufficient excavations and development can be made so as to disclose whether a vein or deposit of such richness exists as to justify work to extract the metal. "Otherwise," say the court, "the whole purpose of allowing the free exploration of the public lands for the precious metals would in such cases be defeated, and force and violence in the struggle for possession, instead of previous discovery, would determine the rights of claimants." And, as meeting the argument of respondent's counsel in the case under consideration, that the laws of the United States require the excavations necessary to enable the locator to prepare and record a certificate to be made directly after his discovery, the court expressly held that the federal laws do not prescribe any time in which such excavations and record shall be made, but say that that is left to the legislation of the state, which in Colorado prescribed at that time 60

days for the excavations upon the vein from the date of discovery, and 30 days afterwards for the preparation of the certificate and filing.

Again, this case of *Erhardt* v. *Boaro* refutes that portion of the respondents' argument wherein it is said that the plaintiffs' location of the Never Sweat was for speculative purposes, and made without discovery, with a view to profit by the explorations and discoveries of the defendants. Justice Field said that if there is a discovery of the presence of the precious metals in the location, or in such proximity to it as to justify a reasonable belief in their existence, "then protection will be afforded to the locator to make the excavations and prepare the proper certificate for record."

In *Iron Silver M. Co.* v. *Elgin M. & S. Co.*, 118 U. S. 196, 6 Sup. Ct. 1177, the supreme court considered the federal statute requiring the location of a claim to be distinctly marked on the ground, so that its boundaries may be readily traced, and used the following language: "Such location often precedes any extended explorations, and is therefore made without accurate knowledge of the course and direction of the vein. When a vein has been discovered, the rules of miners, and the legislative regulations of mining states and territories, generally allow some specified time for explorations before the location is definitely marked. But miners discovering a lode are sometimes in such haste to locate their claim, and mark its extent and boundaries on the surface, that they omit to make sufficient explorations to guide them aright in measuring the ground and fixing its end lines. Hence efforts are not infrequently made to change those lines when the true course and direction of the vein are ascertained by subsequent developments."

After discussing the difficulty in applying the statutes of the United States providing for the extent of the right of the possession and enjoyment of all the surface included within the lines of mining locations, it was remarked:

"The remedy must be found, until the statute is changed, in carefully making the location, and in postponing the marking of its boundaries until explorations can be made to ascertain, as near as possible, the course and direction of the vein. In Colorado the statute allows for this purpose sixty days after notice of the discovery of the lode. Then the location must be distinctly marked on the ground, and thirty days thereafter are given for the preparation of the proper certificate of location to be recorded. *Erhardt* v. *Boaro,* 113 U. S. 527, 5 Sup. Ct. 560." This case thoroughly affirms so much of the *Erhardt* v. *Boaro* decision as implied the allowance of 60 days given by the state statute for the marking of the boundaries until explorations could be made to ascertain, as near as possible, the course and direction of the vein, before distinctly marking the location on the ground.

In *Omar* v. *Soper* (decided in 1888), 11 Colo. 380, 18 Pac. 443, it was said: "To hold that the miner, as soon as he discovers a lode, must immediately stake the territory which he is entitled to claim thereon, in order to protect it from the invasion and claims of other persons learning of his find, would be an unreasonable, if not an impossible, requirement. An attempt to do so would result, in many cases, in leaving the main portion of the lode outside the staked boundaries. The object of the statute in giving sixty days for sinking the discovery shaft was evidently to afford the miner time to sink his shaft, and to ascertain the true course of his lode, when he would be qualified to mark its boundaries on the surface. When the legislative intent is clear, or can be reasonably inferred, it is held to be the duty of the courts to so construe the statute as to render it effective, if possible to do so under the rules of statutory construction. *Simmons* v. *Powder Works,* 7 Colo. 285-289, 3 Pac. 420. To hold that the claim is protected throughout its whole extent, during this period, from invasion and adverse claims, by a notice which, in addition to the statutory requirements, shall specify the

extent of territory claimed along the vein on both sides of the point of discovery, is both reasonable and equitable. It is likewise consistent with the spirit and policy of the statute, and a construction which renders it effective. Such a notice, properly made and posted, is an appropriation of the territory specified therein for the period of sixty days. It has been repeatedly held that only the unappropriated mineral lands of the United States are open to exploration and location. No one can therefore lawfully enter upon the territory so claimed, during the period named, for the purpose of initiating a claim thereto; and it necessarily and logically follows, from an application of the same rules and principles, that no one, during this period, can stand outside such appropriated territory, and in any manner initiate a claim thereto capable of being rendered valid in the future by the happening of fortuitous circumstances."

The statutes of South Dakota (Pol. Code, Comp. Laws Dak. § 1997 et seq.) require a discoverer of a lode to record his claim within 60 days from the date of the discovery, by a location certificate containing much the same information required by the laws of Montana, and that before filing such certificate the discoverer shall do certain development work, and post a notice, and mark the surface boundaries. These statutes were construed in *Marshall* v. *Manufacturing Co.* (decided in 1890), 1 S. D. 350, 47 N. W. 290. As particularly appropriate to the facts of the present case, we quote from that decision: "The testimony of the plaintiffs shows that they did make the discovery, uncovered and disclosed the lode, and placed at the point of discovery a notice as required by the statute; and, until the expiration of sixty days, their claim was a valid, subsisting mining claim, by reason of this discovery. The notice posted notified any one coming within the limits described by that notice, for the purpose of making another location, that there had been a previous location; and, if they attempted to occupy any por-

tion or all of that ground described within the limits of the notice, they would be trespassers. In all legislation, whether by Congress or the state or territory, and by all mining regulations and rules, discovery and appropriation are recognized as the sources of title to mining claims, and development, by working, as the condition of continued ownership, until it is obtained. Whenever preliminary work is required to define and describe the claim located, the first discoverer must be protected in the possession of the claim until sufficient excavations and developments can be made so as to disclose whether a vein or deposit of such richness exists as to justify work to extract the metal. The notice of plaintiffs of July, 1884, constituted an appropriation of the territory specified for the period of sixty days; and if the location of Coates was a portion of that territory, or all of it, and was made before the sixty days had expired, it was not a valid location, and he could acquire no right by reason of it."

Prior to these several last referred to decisions, the case of *Newbill* v. *Thurston,* 65 Cal. 419, 4 Pac. 409, was decided by the supreme court of that state in 1884, and, seemingly, took a contrary view to the decisions just referred to. It appeared in that case that Newbill went upon the mining ground there in controversy, posted a notice, and erected a discovery monument. No other marks were made or monuments erected at that time by him, but the notice stated that the locator claimed 20 days within which to mark the boundaries and record the claim. The ground claimed by the notice extended 500 feet southeasterly, and 1,000 feet northerly, from the notice. For the two weeks following March 26, 1881, which was the date of the discovery and notice, Newbill was upon the claim several times, although he went to other mining regions, and posted notices there. On April 5th the defendants' grantors made a location, properly marked, embracing a portion of the ground "indicated," as the court expresses it, "in the Newbill notice." On the 10th

or 11th of April, Newbill made an arrangement with his co-plaintiffs by which they were to complete his location, for their mutual benefit. Notice was accordingly posted on behalf of said plaintiffs, and monuments erected. When suit was brought to recover as much of the one claim as was within the boundaries of the other, the superior court found that, from the time of the discovery by Newbill until the marking of the boundaries was finally completed, no unreasonable time elapsed, and that there was no unreasonable delay, or any delay, except such as was necessary and unavoidable. The supreme court of California reversed the case, holding that, while the act of Congress does not state any time within which the location must be completed, yet it says the claim must be distinctly marked on the ground, so that its boundaries can be readily traced, and that, if a person is not on the ground engaged in marking the boundaries of his claim, the subsequent locations are to be regarded as prior in time, and must prevail.

This same ground involved in the Newbill case, later on, in 1893, became the subject of a controversy in the federal courts, and we find the questions involved discussed in *Doe* v. *Mining Co.*, 55 Fed. 11. The case on its facts, as stated by Judge Ross, is very close to the controversy before us. The defendants there saw the notice that had been posted by Newbill when they made their location, which took in a part of the ground that would be included by embracing within the boundaries of Newbill's claim as they had been established for Newbill and others. The court regarded the question as of "easy solution," and discussed it as follows: "Newbill was the first discoverer of the ground in question. True, upon the day of its discovery,—March 26, 1881,—he did not establish monuments around the exterior boundaries of the claim; and those monuments were not marked at the time Warden and Yager located the Mammoth claim, on the 6th of April, 1881. But the notice on the stake placed by New-

bill at the point of his discovery notified Warden and Yager, and every one else, that Newbill had located and claimed the vein for 1,000 feet in a northwesterly direction, and for 500 feet in a southeasterly direction, from the discovery stake, with 300 feet on each side thereof. A less definite notice was held sufficient to protect the locator against the acts of subsequent locators by the supreme court, in the case of *Erhardt* v. *Boaro,* 113 U. S. 527, 5 Sup. Ct. 560."

In California, at that time, there appeared to be no mining rules or regulations fixing the time within which locators should establish the exterior boundaries of their claims; but Judge Ross held that locators should be allowed a reasonable time, and that it had not expired when the defendants went upon the ground that had been claimed by Newbill. "They then saw," continues the court, "and should have read Newbill's notice of March 26th, claiming the vein on which it was posted for 1,000 feet northwesterly and 500 feet southeasterly of his discovery monument, together with 300 feet on each side of it, and claiming the reasonable time of twenty days within which to mark the exterior boundaries of his claim. Warden and Yager were thereby apprised that no part of the ground embraced by Newbill's notice was open to location by them, and their act in including a part of that ground was therefore nugatory. Speaking of a similar notice, the court, in the case of *Marshall* v. *Manufacturing Co.* (S. D.), 47 N. W. 293, said: 'The notice posted notified any one coming within the limits described by that notice for the purpose of making another location that there had been a previous location, and, if they attempted to occupy any portion or all of that ground described within the limits of that notice, they would be trespassers.'

"It is suggested that the act of Parks, Wallace, and Farrell in marking the exterior boundaries of the Red Jacket claim, on the 12th of April, was unavailing, because one of those corners was established within the boundaries of the Mam-

moth claim, as established by Warden and Yager, on the 6th of April. To affirm that position would be to affirm that the perfecting of the right initiated by Newbill on the 26th of March could be arrested and defeated by the illegal and void act of Warden and Yager in embracing, within the boundaries of the Mammoth claim, ground not at the time subject to location. I think it clear that the defendant, Waterloo Mining Company, is entitled to that portion of the mining ground in dispute that is embraced by both the Red Jacket and Mammoth locations, and that complainant Doe, has no right thereto nor interest therein."

In 1894 the supreme court of Oregon, in *Patterson* v. *Tarbell,* 26 Or. 29, 37 Pac. 76, was called upon to pass upon the right to the possession of certain surface ground within the boundaries of the Collateral quartz mining claim, located and owned by plaintiff, and the Palmer quartz mining claim, located and owned by the defendant. Tarbell was prospecting within the limits of the Virtue mining claim, by permission of the owner of the latter claim. His object was to trace new veins, if he could, to the adjoining public lands, with a view of locating a claim. He discovered a spur which he traced to its intersection with a gold-bearing vein of quartz upon unoccupied land. From February, when he was prospecting, until April, he continued his work at intervals, for the purpose of determining the course or strike of the lead discovered by him, and, in so doing, sunk several shafts along the course or strike of the lode or vein. About March 10th, and soon after making the discovery, he posted a notice at the first shaft sunk by him, and put up some preliminary stakes. He then went away to secure a mineral surveyor; and, during his absence, plaintiff, supposing the ground unoccupied, located the Collateral claim, posted a notice, and marked the boundaries in manner required by law, and embraced the shafts and pits dug by the defendant. The contention of the defendant in that case was that the first discoverer of a

lode or vein has a reasonable time after the discovery in which to trace out and determine the direction or course of such vein or lode before locating his claim, and in the meantime is protected in his right to 1,500 feet of surface ground in length along the vein or lode, and 300 feet on either side; while the plaintiffs contended that, as soon as a discovery is made, the claim must be located, by marking its boundaries on the ground. The court emphasized the fact that there is no specific time allowed by the laws of Oregon for exploration after a discovery is made, and before a location is required to be definitely marked on the ground; and, in the absence of such legislation, they met the question presented as one to be determined by the mining laws of the United States. It was decided that, in the absence of local legislation allowing some time for exploration, the discoverer of a lode "must immediately locate his claim, by distinctly marking the same on the ground, so that its boundaries can be readily ascertained, in order to hold it against a subsequent valid location peaceably made." Among other things the court said:

"Requiring the discoverer of a mine to proceed diligently to complete his location, without waiting to trace the course or strike of the vein or lode, may in some instances work an apparent hardship; but, until the matter is provided for by some local rule or regulation, it is better, whatever the effect may be in particular cases, that the rule should be settled, and thus prevent as far as possible the uncertainty in titles to mining claims, and the strife and litigation among miners, which would necessarily follow if the discoverer is allowed an indefinite time in which to develop his lode or vein, which, in many instances, would require much time and labor and a large expenditure of money. If, during such development or exploration, he is allowed to hold a floating grant to surface ground six hundred by fifteen hundred feet in size, with the right to definitely locate the same as he may subsequently

determine, it would create great uncertainty in mining titles, increase litigation, and often defeat the purpose and object of the law, throwing open the mining lands of the country to occupation and purchase. Nor do we find anything in the authorities cited by the defendants in conflict with the rule which we have suggested. The decisions in the cases of *Iron Silver M. Co.* v. *Elgin M. & S. Co.*, 118 U. S. 196, 6 Sup. Ct. 1177, and *Erhardt* v. *Boaro*, 113 U. S. 527, 5 Sup. Ct. 560, were both made under the law of Colorado, which allows the discoverer a specified time for exploration before marking the boundaries of his claim."

This case follows the California rule in *Newbill* v. *Thurston, supra,* but it undoubtedly conflicts with the decision of Judge Ross in *Doe* v. *Mining Co., supra,* and with *Patterson* v. *Hitchcock* (decided in 1877), 3 Colo. 533, but, so far as it bears upon the case at bar, by implication it affirms the views that, where there is a state law allowing the discoverer a specified time for exploration before marking the boundaries of his claim, he will be protected in his possession until he has complied with the state statute.

The last decision which we have been able to find in point is the appeal of *Doe* v. *Mining Co.* to the circuit court of appeals (17 C. C. A. 190, 70 Fed. 455). The opinion of the court is by Judge Knowles, whose opinions upon questions of mining law, as recorded in the earlier Montana Reports, and in later years in the Federal Reports, have always been regarded with very high respect by the profession. After recapitulating the facts connected with the discovery and location by Newbill, as heretofore set forth, the learned judge goes on to say:

"The first contention is that the location of the Red Jacket gold, silver, and nickel mining claim is not a completion of the claim made by Newbill. The supreme court of California, upon the same evidence, in the case of *Newbill* v. *Thurston*, 65 Cal. 419, 4 Pac. 409, held that it was not. With

the highest respect for that distinguished court, I cannot come to the same conclusion. Newbill undoubtedly made some kind of a mineral discovery on the ground located. He posted a notice on this ground, claiming the right to locate some 1,500 feet on the same,—500 feet in one direction, and 1,000 feet in another, from the point where he posted his notice. He went upon the ground after this, with the view of marking the boundaries of his location, and was prevented by sickness. He made an agreement, for a valuable consideration, with Parks, Wallace, and Farrell, by which they were to complete his location. In pursuance of that agreement, they did complete it. That was the contract and intention of all parties. The fact that a new location notice was posted by them on the ground, in which an addition of some descriptive terms was applied to the name given in the location notice of Newbill, cannot make it a new location. The ground was what was sought, not a name. There is no objection to changing the name of a location until after a record is made of the same. There can be no objection to changing the description in a location notice, so other ground is not embraced, up to the date the location notice becomes a record. From necessity, such a fact would often occur in the location of mining ground. A location notice generally does describe the ground located, and not what it is proposed to locate. The notice of Newbill should have no other force than a notice of discovery. As a notice of discovery and intention to claim and locate the ground described therein, it was certainly sufficient. *Erhardt* v. *Boaro,* 113 U. S. 527, 5 Sup. Ct. 560; *Marshall* v. *Manufacturing Co.* (S. D.), 47 N. W. 293."

Judge Knowles also discusses proof of a custom in a particular mining district, allowing a discoverer of a mineral-bearing vein 20 days after his discovery in which to fully complete his location of his claim, and says, without qualification, that there is no doubt that the discoverer of a min-

eral vein should have a reasonable time after the discovery of his vein in which to complete his location embracing the same, and further he says: "Wherever there has been any legislation upon the subject, the time given after the discovery in which to complete a mining location has exceeded twenty days. The statute in Colorado is sixty days, and the record thereof must be made within thirty days thereafter. Without consulting what has been considered by rules and regulations or statute law upon the subject as to the time within which after discovery the location of a mining claim should be completed, we would say that what would be a reasonable time for such completion would depend upon the circumstances affecting the ability of the locator to properly define his claim."

Lindley, in his valuable and highly approved work on Mines, discusses the conflicting rulings in the Newbill case, but approves of the federal decisions, as according to the spirit of the law as interpreted by the supreme courts of Colorado and of the United States. He says: "To hold that the miner, as soon as he discovers a lode, must immediately stake the territory which he is entitled to claim, in order to protect it from invasion and claims of other persons, would be an unreasonable, if not impossible, requirement." Section 339.

He also lays it down that, where the statutes require preliminary work in order to define and describe the claim located, the first discoverer "must be protected in the possession of the claim until sufficient excavations and development can be made so as to disclose whether a vein or deposit of such richness exists as to justify the work to extract the metal." He sums up the logical consequence of the rules established by the case of *Erhardt* v. *Boaro,* and the later federal decisions which have followed that decision, in the following language: "The effect of this rule is practically to reserve,

after the discovery and during the statutory period allowed for perfecting the claim, a surface area circular in form, the radius of which may be the length claimed on the discovered lode, within which area the location may be ultimately made. Such is the manifest intent of the rule. This was the custom under the act of 1866. The miner posted his notice, claiming so many linear feet on the vein; and under the law as then interpreted, prior to fixing the situs of his lode, by filing a diagram for patent purposes, he might follow the vein wheresoever it ran, to the length claimed. When he filed his diagram, and inclosed his lode within surface boundaries, his right to pursue the vein on its course ceased, when it passed out of his surface lines.

"Under the existing state of the law, the location must be marked within a certain period of time, whereupon the locator's rights become definitely fixed and confined, except as to the extralateral right, to his marked boundaries. Until this is done, however, and within the prescribed period, his right to be protected to the extent heretofore stated is well settled." Section 339.

The decisions of the supreme court of the territory and of the state rendered prior to the enactment of the statutes which require development work before boundaries are to be defined cannot control the present condition of the law. It is true, we think, that one of the objects in requiring a location to be marked upon the ground is to fix the claim, and to prevent floating or swinging, so that those who are in good faith looking for unoccupied ground may know exactly what has been appropriated; and we thoroughly agree with the principle announced in *Hauswirth* v. *Butcher,* 4 Mont. 299, 1 Pac. 714, that the provisions of the law designed for the attainment of this object are very important, and ought not to be frittered away by construction; but, on the other hand, it is of equal importance that the miner have ample opportunity

to perfect his mining location, in order that he may be protected in the full enjoyment of the rights accorded to him by the federal statutes. And it was for the purpose of affording the full enjoyment of these rights that the state statutes were passed, merely postponing the necessity for definition by marking the boundaries of his claim until he may have full opportunity to ascertain the strike or course of the vein or lode which he has discovered. The law has said that he must do all this within 90 days. Thereafter there can be no floating or swinging. But up to the expiration of that time, under the decisions quoted, we are forced to conclude that, if in good faith, he may use his discovery post as a pivot, and move his lines, at least in the general course of his vein given in his notice, so as to secure the full benefit of his discovery.

The distinction between the notice of discovery or notice of location required to be posted on the claim by section 3610, and the declaratory statement required to be filed for record by section 3612, is a substantial one, easily understood when the purpose of each is kept in mind. The notice of discovery should be, and usually is, posted immediately at the discovery hole, and often before the discoverer can possibly survey, or even measure his ground. It is often done before even specific bearings are known. It is a simple announcement, and meant only to be a simple notice of a discovery, and of an intention to claim the vein discovered, and, by posting it, the discoverer finds an easy and quick way of announcing his claim. Afterwards, though, when an opportunity is had to follow the vein on its strike, then the boundaries must be marked, and the claim must be described by reference to natural objects or permanent monuments. Then it is, too, but not before, that the evidence of the location must be preserved, by recording the declaratory statement containing such description of the location with refer-

ence to some natural object or permanent monument as will identify the claim.

The notice of location is a protection to the discoverer during the process of location. "The record of a mining claim," says Judge Ross in *Gird* v. *Oil Co.*, 60 Fed. 531, "when one is required, is intended to contain a more exact and specific description of the claim than the notice posted upon it." *Gleeson* v. *Mining Co.*, 13 Nev. 465.

But respondents' counsel say, even if this be the law generally, yet in this case, plaintiffs having described their location by their notice as extending along the Never Sweat lode claim in a southerly and northerly direction from the center of the discovery shaft, they cannot now object to the acts of defendants in running the lines of the Never Sweat due north and due south, so as to allow defendants to perfect a location of the Yukon claim without the lines of the Never Sweat when so run due north and due south. This argument, of course involves the proposition that the statute which requires a notice to be posted at the point of discovery, in which must be contained the general course of the vein or lode "as near as may be," demands an accurate description of the course of the vein by the points of the compass. We cannot adopt such a construction of the law without frittering away the underlying purpose of the statute to give to the discoverer 90 days in which to define the boundaries of his claim; for, if he must accurately state the general course of the vein in his notice posted at the point of his discovery, and at the time thereof, and is to be held to such course literally, the development work that he is required to do to demonstrate whether he has a claim worth further exploitation would be of no avail to him if it should demonstrate that the course of his vein varies even to the slightest extent from the general course given in his discovery notice. The statute requires only that he give the general course "as near as may be";

and where, as in this case, the course is given as southerly and northerly, and it subsequently appears by the surveyor's plats that the course of the vein is not due north and south, in the absence of proof of a lack of good faith we hold that such a notice is sufficient and valid.

In *Book* v. *Mining Co.*, 58 Fed. 106, a claim was described as beginning at the southwest boundary of the West Justice and lying north of the Ennis mine. It was argued in the circuit court of the United States that the locations were invalid, because notices were posted that did not correctly describe the lode. Judge Hawley said:

"In construing notices of this character, where, under the mining rules and local regulations or state law, such notices are required to be posted upon the ground, the courts are naturally inclined to be exceedingly liberal in their construction. Such notices are often drawn by practical miners, unaccustomed to legal forms and technical phraseology; hence the language used in the notices is often subject to more or less criticism by counsel learned in the law, and engaged in preparing documents in legal shape and form. Then, again, locations are often made without any accurate knowledge of the true course and directions which a compass would readily give, and mistakes in the notice as to the direction and course of the ground located often occur. But such mistakes do not invalidate the location. Positive exactness in such matters should never be required. It is the marking of the location by posts and monuments that determines the particular ground located."

In that same case the location notice described the claim as extending 1,500 feet in a northerly direction. That was a mistake so far as the direction was concerned, as true north would have carried the line over and across another mine, instead of along the proper line, but the court said:

"The word 'northerly,' under such circumstances, con-

ditions, and surroundings, should not be interpreted as meaning due north. It includes and may mean any meridian line or course between a due north and northwest, and is defined and made certain by the posting of the stakes or the building of the monuments at the corners of the locations, or along the lines thereof. Such stakes or monuments would control the courses specified in the notice." *West Granite Mt. M. Co.* v. *Granite Mt. M. Co.*, 7 Mont. 356, 17 Pac. 547; *Gamer* v. *Glenn*, 8 Mont. 379, 20 Pac. 654.

The respondents' counsel, in their brief, tell us that the court was impressed with the bad faith of these plaintiffs; but there is nothing in the record which informs us that the court considered that question at all, and we cannot presume that they acted in other than good faith.

To extend the discussion of these questions would be useless. The law is too well settled to be disturbed at this late day, and the only clear deductions which we can make are in harmony with Lindley's statement, as we have quoted it. If the locator postpones marking his boundaries, he must be protected until the statutory time given him in which to do the acts required has elapsed; and until he has done what the statutes require, if his notice is valid, and he has a discovery, all persons proceeding to enter within the limits of the ground located do so at their peril.

If the questions which we have discussed were *res integra*, we should be disposed to take a view of the federal statute (section 2324) differing from the rule of *Erhardt* v. *Boaro*, *supra*, and to agree with the California and Oregon cases cited, which interpret the law as requiring an immediate marking of the location on the ground, so that the boundaries can be readily traced, or that a *possessio pedis* be had until they can be so marked within a reasonable time. There is a great deal to be said in support of the argument that Congress never meant to allow the discoverer to stop his work,

leave his claim, and postpone marking his boundaries for any period of time. The effect of the present construction is to give advantages to the discoverer beyond what the statute seems to fairly contemplate; and yet, if the right to postpone the marking of the boundaries for 90 days exists, there is no escape from the conclusion that the right to swing in good faith during that time goes with it. This is so because the reason for allowing the right to postpone is to definitely ascertain the strike, so that the discoverer may secure the benefit of his location before marking. Therefore, where the discoverer gives, as he must under the state statute, the general course of his vein in his discovery notice, and, notwithstanding those courses, he can postpone marking the ground for 90 days thereafter, so that the boundaries of his claim may be traced, it should necessarily follow that, if the course given in the notice posted is not the true course of the lode as ascertained, he may swing his claim so as to include within his boundaries ground that was not embraced in the notice of discovery, provided it includes the true course of the vein claimed. This right to postpone thus gives a discoverer a circle to move his claim in until he marks its boundaries, the radius of the circle being ordinarily a distance equal to the longest distance claimed from the point of discovery. This, for a time, practically withdraws a large area from the public domain, and compels prospectors to abide the time when the discoverer of a vein may elect to mark his ground. We doubt if Congress ever intended such a consequence. The question, however, involves federal laws and statutes complementary of federal laws; so we feel bound by the interpretations of the United States courts, hence dismiss the subject with the foregoing observations of our own.

The application of what we have said necessarily leads to the conclusion that the defendants in this case had no right to embrace in the location of the Yukon any of the ground

included within the boundaries of the Never Sweat, as the plaintiffs defined said boundaries, within the period of 90 days after their discovery of the Never Sweat.

The judgment is reversed, and the cause remanded, with directions to grant a new trial.

Reversed and remanded.

BRANTLY, C. J., and PIGOTT, J., concur.

DIAMOND PLATE GLASS CO. ET AL. v. MARION CURLESS.

(22 Indiana App. 346; 52 N. E. 782. Appellate Court. February 2, 1899.)

Indefinite term. Right in either landlord or tenant to determine at end of any year. An oil lease provided that it should be deemed to have terminated "whenever natural gas ceased to be used generally for manufacturing purposes in Howard county, Indiana, or whenever the second party, their heirs or assigns, shall fail to pay or tender the rental price herein agreed upon, within sixty days of the date of its becoming due, and in the event of the termination hereof for any cause, all rights and liabilities hereunder shall cease and terminate." Defendants never took possession of the premises. *Held*, that the agreement ran only from year to year, and that at the end of any year either party could terminate the agreement, the one by refusing to accept, and the other by refusing to pay the stipulated sum.

Appeal from Circuit Court, Tipton County; George H. Gifford, Special Judge.

Action by Marion Curless against the Diamond Plate Glass Company and others. Judgment for plaintiff. Defendants appeal. Reversed.

Construction of clauses declaring lease void on certain events. *Leatherman* v. *Oliver*, 17 M. R. 526 and notes.

Lessee may elect to quit when not bound by covenants. *Glasgow* v. *Chartiers Co.* 17 M. R. 523.

Lease to bore gas wells without time limit: *Held*, a revocable year to year lease. *Diamond Co.* v. *Echelbarger*, 24 Ind. App. 124; 55 N. E. 233.

A lease allowing right of surrender held unilateral and without consideration. *Eclipse Co.* v. *South Penn Co.* 47 W. Va. 84; 20 M. R. —. *Trees* v. *Eclipse Co.* 47 W. Va. 107; 20 M. R. —. *Roberts* v. *McFaddin*, (Tex.) 74 S. W. 105.

Lessee not allowed to prove parol agreement permitting surrender at will. Cases construing the null and void clauses reviewed and re-affirmed. *Cochran* v. *Pew*, 159 Pa. 184; 28 Atl. 219.

Under a lease with privilege to renew for one of several designated terms, there can be but one election and the right may be lost by delay to exercise it. *Perry* v. *Rockland Co.* 94 Me. 325; 47 Atl. 534.

BLACKLIDGE & SHIRLEY and STUART BROS. & HAMMOND, for appellants.

MOON & WOLF, for appellee.

ROBINSON, J. Appellee recovered a judgment against appellants before a justice of the peace for acreage rent claimed to be due on a certain agreement. Appellants appealed to the circuit court, where appellee filed an amended complaint, to which demurrers were overruled. Appellants filed a cross complaint, asking to have the agreement canceled, which was struck out on motion. Judgment against appellants. The errors assigned question the sufficiency of the complaint, sustaining the motion striking out the cross complaint, and overruling the motion for a new trial.

This is not a suit to collect well rental on certain tracts, each 20 feet square, as in the case of *Diamond Plate Glass Co.* v. *Tennell,* 22 Ind. App. 132; 52 N. E. 168; but it is a suit to collect acreage rental on all the land described in the agreement. In the above case no provision was made for any acreage rental on the whole land, but on the particular square tracts, and well rental on those particular tracts was alone in controversy. That case was entirely different from the one at bar. In this case we have nothing to do with the tracts 20 feet square.

The questions involved are to be determined by a construction of the written instrument executed by the landowners to the assignor of the appellants. The instrument provides that the party of the first part "this day granted and leased to the second party, their heirs and assigns," certain tracts of land, each 20 feet square, of certain real estate, particularly described, and containing 160 acres, second party to have right of ingress and egress over the whole land, to erect necessary buildings, use of highways adjoining to lay pipes, to deliver first party free gas for domestic use, to pay the first

party one-sixth of all oil produced, and further providing: "This grant and lease shall be deemed to commence at and run from the date of the signing hereof, and shall be deemed to have terminated whenever natural gas ceases to be used generally for manufacturing purposes in Howard county Indiana, or whenever the second party, their heirs or assigns, shall fail to pay or tender the rental price herein agreed upon within sixty days of the date of its becoming due. And in the event of the termination hereof, for any cause, all rights and liabilities hereunder shall cease and terminate. And, as an additional consideration, the said second party agrees to pay to said first party an annual rental of one hundred dollars each year for each gas well drilled as aforesaid which produces gas in paying quantities sufficient for manufacturing purposes. Said payments to commence and become due and payable on the —— day of January, as to each of said gas wells after the completion thereof, and to continue thereafter annually during the continuance of this lease. Until the drilling of a gas well on said premises by said second party, they shall pay to said first party an annual rental of 50-100 dollars an acre, to be paid on the 1st day of January of each year, commencing 1891; if the wells are not drilled in five years from date, the rental to be raised to one dollar an acre thereafter as to each 40-acre tract. Should any other gas well or wells be put down on said —— acre tract of land other than herein stipulated for, then said second party, their heirs and assigns, shall thereafter be relieved and released from the payment of the rental as in this contract provided." Appellants never took possession of the premises described in the instrument.

The fact that the parties have used the word "lease" does not necessarily determine the character of the instrument. The intention of the parties, as gathered from the whole instrument, must determine its character. It cannot be construed to be a lease for years. It lacks one of the essential

requisites of such a lease. It does not have a certain determination, "either by an express enumeration of years, or by reference to a certainty that is expressed, or by reducing it to a certainty upon some contingent event, which must happen before the death of the lessor or lessee." Wood, Landl. & Ten. §§ 207, 209; Woodf. Landl. & Ten. (12th Ed.) p. 117; 3 Chit. Bl. pp. 140, 143; Tayl. Landl. & Ten. § 15. Nor could it be a tenancy from year to year, even if the relation of landlord and tenant ever existed between the parties. Such a tenancy exists where the premises are occupied with the assent of the landlord, without any agreement as to the duration of the term. Burns' Rev. St. 1894, § 7089 (Rev. St. 1881, § 5208). If we should conclude that the relation of landlord and tenant existed, an annual rent having been paid, the tenancy could be no greater than from year to year, and such a tenancy may be terminated by the tenant at the end of any year. To terminate such a tenancy by a tenant, the statute does not require notice to be given to the landlord. And conceding that a tenancy existed, if it was a tenancy at will, it was at the will of both parties. If an estate is at the will of one of the parties, it is equally at the will of the other party. *Knight* v. *Indiana Co.*, 47 Ind. 105; 17 Am. R. 692.

In the agreement in question, appellants did not bind themselves to put down a well within any specified time. It was optional with them whether any wells would be drilled. This is clearly shown to have been the intention of the parties by the provision that, if wells were not drilled within five years from the date of the agreement, the amount to be paid per acre was to be increased. All rights remained in the landowner, except those granted to appellants. From the terms of the instrument it is clear that appellants did not have the exclusive right to take gas from the land described for any fixed time, or for any time. The record says nothing whatever about any contemporaneous oral or written agree-

ment between the parties. If such an agreement existed, it has not been brought to this court. Appellee granted to appellants a bare right to occupy land for a particular purpose. Until possession was taken, no present title was vested in appellants, except the mere right of exploration for gas and oil; and this right was not exclusive. The sum paid for this right was paid annually, but at the end of the year there is nothing in the agreement compelling the landowner to accept, or the appellants to pay, this amount for another year.

In the case of *Reed* v. *Lewis,* 74 Ind. 433, 39 Am. R. 88, cited by appellee's counsel, the instrument provided that the first party "doth hereby demise, grant, and lease unto" the party of the second part, "his executors, administrators, and assigns," certain real estate, until the machinery on the same should be removed. Possession was taken under the instrument. This was held not to be a lease for years, because it is of uncertain duration, and "leases for years must have a certain beginning and a certain ending, and so the continuance of the term must be certain,"—citing 1 Shep. Touch. 272; Co. Litt. 45. Concerning the nature of the estate conveyed, the court said: "The lease in controversy is to continue until an uncertain contingency, to wit, the removal of the machinery; but as the word 'heirs' is not now necessary to create a fee, and as every grant is construed most strongly against the grantor, and conveys all he has unless a lesser estate is expressed, it would seem that here an estate in fee was created, determinable upon the happening of the contingency."

In the case of *Gilmore* v. *Hamilton,* 83 Ind. 196, also cited by appellee's counsel, the first party "doth hereby demise and grant" certain real estate to the second party, "their heirs, executors, administrators, and assigns, * * * during the time they may occupy the same for a sawmill yard." The grantees took possession. The court did not de-

cide what estate passed by the grant, but simply held that it did not create a tenancy at will, which the lessor could terminate by a month's notice to quit at his option.

The above cases are clearly distinguishable from that at bar. In the case at bar, possession was not taken under the agreement; no attempt was made to convey the real estate; not even the right of exclusive possession was given. It was simply a grant of a right to drill wells and erect other appliances necessary to drill and operate the wells. In neither of the above cases does it appear that any rent was reserved.

In *Knight* v. *Indiana Co.*, 47 Ind. 105, cited by appellants' counsel, the instrument was signed by the grantors and the grantee, and, for the consideration of one dollar, "doth hereby bargain, sell, and convey unto the party of the second part, his heirs and assigns, all the mineral coal, limestone, iron ore, fireclay, and oil in and upon and under" certain lands. The grantee was to enter upon the lands, and search for coal, etc., to open and work the mines, to pay a certain amount annually, and also royalty during continuance of the agreement. A failure to make payments upon request or within 60 days after demand was to be deemed an abandonment of the agreement. The agreement gave the grantee the right to abandon the lands and mining at any time. In that case it was held that the agreement created a tenancy at will.

Counsel for appellee cites the case of *Indianapolis Co.* v. *Kibbey*, 135 Ind. 357, 35 N. E. 392. The lease in that case is in some particulars like the instrument in question, but it also contains some material differences. The lease in that case provided expressly that the lessors "covenant and agree and hereby bind themselves, their heirs, executors, and assigns, not to drill, or to suffer or permit others to drill or put down any other gas well or wells on any part of said entire eighty-acre tract of land described as above during the continuance of said contract," except the lessor could drill

a well on the premises for the use of himself and neighbors. Suit was brought by appellee to restrain appellant, a stranger who had entered upon the land, and commenced to bore a well, and it was held that injunction would lie. In the instrument under consideration no such provision is found, nor does the record show that any such agreement was made at the time the lease was executed, or at any other time. In the cases of *Indianapolis Co.* v. *Teters,* 15 Ind. App. 475, 44 N. E. 549; *Edmonds* v. *Mounsey,* 15 Ind. App. 399, 44 N. E. 196; *Breckenridge* v. *Parrott,* 15 Ind. App. 411, 44 N. E. 66; *Kokomo Gas Co.* v. *Albright,* 18 Ind. App. 151, 47 N. E. 682—the leases under consideration were for terms of years.

In *Columbian Oil Co.* v. *Blake,* 13 Ind. App. 680, 42 N. E. 234, the landowner granted all the oil and gas in and under certain lands, the grantee expressly agreeing to commence drilling a well within 30 days, and to complete a well within 30 days after drilling commenced, and, upon failure so to do, to pay annually thereafter five dollars per acre until the well was drilled and suit was brought to recover the rental for the whole tract. The liability of the company for the rental was placed upon the ground that the company was given an exclusive right to all the oil and gas under the land, and that the landowner could not have granted this right to others, because it was already granted to the company; that the failure to make the test was not the fault of the landowner, but of the company, and, by the terms of the contract, the company had expressly agreed to pay a certain acre rental in the event it failed to drill a well as agreed. The case differs from the case at bar in that it gave the company an exclusive right; that the company had bound itself to drill a well, and to drill it within a certain time; while in the case at bar the exclusive right to drill was not granted, nor did the grantee obligate himself

to drill a well at any time. In the case at bar it was optional whether a well should be drilled, while in the above case it was not.

As we construe the instrument in question, it was an agreement whereby appellants, until possession was taken by them, agreed to pay an annual sum for the right to go upon the land at any time within the year, and prospect for gas and oil; that the agreement ran only from year to year; and that, at the end of any year, either party could terminate the agreement, the one by refusing to accept, and the other by refusing to pay the stipulated sum. It has some of the elements of a tenancy from year to year, and also a tenancy at will, but it is neither. Possession never having been taken by the terms of the instrument, it cannot be said that the relation of landlord and tenant ever existed. It is well settled that in a lease, where the relation of landlord and tenant exists, the lessee will not be permitted at his option to terminate the tenancy before the expiration of the term by failing or refusing to pay rent under a clause in the lease providing that the grant shall terminate whenever the grantee shall fail to pay or tender the rent within a certain time after it becomes due. See *Ray* v. *Gas Co.,* 138 Pa. St. 576, 20 Atl. 1065, 12 L. R. A. 290; *Westmoreland Gas Co.* v. *De Witt,* 130 Pa. St. 235, 18 Atl. 724, 5 L. R. A. 731; *Leatherman* v. *Oliver,* 151 Pa. St. 646, 25 Atl. 309; *Sargent* v. *Robertson,* 17 Ind. App. 411, 46 N. E. 925.

Construing the instrument in question, as we do, to be an agreement whereby a right was granted for a stipulated sum, payable from year to year, and continuing from year to year if both parties desired that it should so continue, it could be terminated by either party at the expiration of such period, and a failure to pay the stipulated sum, as provided in the agreement, or a refusal, under the terms of the agreement, to pay such sum, would work its termination.

Judgment reversed.

BASIN MINING & CONCENTRATING CO. v WALLACE M. WHITE.

(22 Montana 147; 55 Pac. 1049. Supreme Court. February 6, 1899.)

Fraction omitted by changing lines. The U. S. Deputy mineral surveyor employed by plaintiff to survey for patent upon misinformation as to adjoining boundaries so changed the lines as to omit a certain fraction. This fraction was immediately located by defendant. In a few days the mistake was discovered and a resurvey promptly procured. *Held*, that the fraction was not lost to plaintiff.

Temporary mistake of surveyor. One who has located a claim, filed his notice and procured a survey thereof by the United States deputy surveyor, as required by law, cannot be deprived of his property because the surveyor failed by mistake to include all that was covered by his location notice, where the mistake was cured by a resurvey, under the orders of the Interior Department, within a few days after the owner discovered it.

The surveyor is an official of the United States government and acts in that capacity and not as the agent or attorney of the owners of mining claims.

Appeal from District Court, Jefferson County; Frank Showers, Judge.

The rulings of the land office are conclusive upon questions of fact; upon questions of law they are reviewable only upon a direct proceeding; upon either law or fact they are not open to collateral attack. *Aurora Hill Co.* v. *85 M. Co.* 15 M. R. 581.

The rulings of the land office cannot be anticipated in a suit at law. *McTarnahan* v. *Pike*, (Cal.) 27 Pac. 784.

The land office may rightfully cancel placer application when land is really agricultural. *German Co.* v. *Hayden*, 21 Colo. 127; 40 Pac. 453.

The courts are without jurisdiction to entertain a suit to decide the rights of parties to land the title to which is standing in the name of the government and concerning which a contest is pending in the land office. *Cosmos Co.* v. *Gray Eagle Co.* 112 Fed. 4; 21 M. R. —; Affirmed 190 U. S. 301.

The land office has power to cancel receiver's receipt. *Murray* v. *Polglase*, 17 Mont. 455; 43 Pac. 505.

Decision of cancellation operates *ipso facto*, and party need not

Action by the Basin Mining & Concentrating Company against Wallace McC. White. From a judgment for defendant and the denial of a new trial plaintiff appeals. Reversed.

CLAYBERG, CORBETT & GUNN, for appellant

STAPLETON & STAPLETON, for respondent.

PER CURIAM. Action pursuant to section 2326 of the Revised Statutes of the United States to determine the right of possession of a mining claim. Defendant (respondent) applied for patent to the "Canon Lode Claim." Plaintiff (appellant) filed its adverse claim thereto, asserting ownership and right of possession by virtue of a prior location under the name of the "Hope Lode Claim." The answer disclaimed any interest in the Hope except the area in conflict, and averred ownership and right to the possession of the area in controversy under the location of the Canon. The defendant also pleaded abandonment by the plaintiff prior to December 14, 1893, the date of the location of the Canon lode. He further pleaded that in November, 1893, plaintiff

wait for the cancellation in the local land office. *Germania Co.* v. *James*, 82 Fed. 807.

The holding by the land office rejecting a placer application for the reason that it was not placer ground, is not *res adjudicata*. *Clipper Co.* v. *Eli Co.* 29 Colo. 377; 68 Pac. 286.

Land office employes prohibited from locating claims. *Lavagnino* v. *Uhlig*, (Utah) 71 Pac. 1046.

Land office decisions are not binding on courts, but should not be overruled unless clearly erroneous. *Id.*

The secretary of the interior may construe, but cannot enlarge or restrict, the scope of an act of Congress *U. S.* v. *United Verde Co.* (Ariz.) 71 Pac. 954.

The land office has final jurisdiction to determine the mineral or non-mineral character of land, and where such question is determined adversely to a plaintiff in a suit involving the same controversy, the suit must be dismissed. *Goldstein* v. *Behrands*, 123 Fed. 399.

caused an official survey of the Hope claim to be made by the surveyor general of Montana, with a view to applying for patent therefor; that, according to this survey, the Hope claim did not include the Canon claim; and that, relying upon the fact that plaintiff did not claim the area of the Canon lode claim, and believing the ground to be part of the public domain, located the Canon lode claim and afterwards expended a large amount of money in the development thereof; but that, after defendant had applied for a patent, plaintiff caused an amended survey to be made of the Hope lode claim and included therein the Canon lode. The defendant contends that by reason of these facts the plaintiff is estopped from asserting title to the area in conflict.

Plaintiff, by replication, alleged that in November, 1893, it made application for a survey of the Hope claim, and directed the same to be surveyed as located; that the survey was made under the direction of the surveyor general of Montana, and that the deputy mineral surveyor making the survey was not plaintiff's agent; that by mistake the deputy excluded from the Hope survey the ground in controversy, and without the plaintiff's knowledge or consent; that, as soon as such mistake was discovered, an application was made for an amended survey, so as to include the ground omitted; that an order for an amended survey was issued, and an amended survey made which included the ground in conflict; and that the application for a patent to the Hope claim was based upon this amended survey.

The case was tried before a jury, and special findings returned, together with a general verdict. The verdict was for the defendant. The jury found that the area in controversy was omitted from the official survey of the Hope by mistake, and that the plaintiff intended to abandon the area in dispute. Other findings were made favorable to the defendant. The court adopted the general verdict of the jury and all of

the special findings, except that relating to abandonment, upon which issue the court found that plaintiff did not intend to abandon the area in conflict. The court found also that plaintiff was estopped from claiming the ground in dispute, and that defendant was the owner and entitled to the possession thereof. Plaintiff's motion for a new trial was overruled, and an appeal taken to this court.

It is conceded that the ground included in the Canon location as made by respondent on December 14, 1893, was included in the boundaries of the Hope lode claim as described in the recorded notice of location of the Hope, a certified copy of which record was on file with the surveyor general, and delivered to the United States deputy mineral surveyor, on October 9, 1893, when he was ordered to make an official survey of the Hope. The deputy mineral surveyor had no instructions other than his order of survey, which directed him to survey the claim in strict conformity with existing laws and official regulations and instructions thereunder. The superintendent of the Hope told him they wanted all the ground they could get, but did not direct him what to include. When the survey was made the surveyor threw one end of his survey as far easterly as he could, leaving out a fraction of the Hope ground as located. Acting also upon certain information which he had obtained to the effect that an application for patent had been made for certain adjacent ground as the Lotta claim, the surveyor made his lines conform to the lines of such adjacent claim. His object in doing so, he said, was to simplify his notes, and make no conflicts. He used a plat furnished by the surveyor general, which showed an adjacent claim, but did not show the original Hope location, and he presumed the fraction appearing thereon was patented with the Lotta, the adjacent claim. The surveyor was several weeks engaged in his work. Notices were posted on the claim December 18, 1893. A week or ten days subsequent to the completion of it he discovered that the frac-

tion last referred to had not been claimed in the patent for the Lotta, and that it was inside of the original location of the Hope, as shown on the official plat as filed. Thereupon he notified the Hope people of his error by telling them of his omission to include all the unclaimed ground. They said they wished all the ground, and would take steps to have a resurvey made. Accordingly they did so, and on January 18, 1894, a resurvey was ordered by the surveyor general in obedience to telegraphic orders from the interior department at Washington. This resurvey was made at once, and embraced the area of the Canon as included in the original Hope location.

It seems to us so clear that a *bona fide* mistake was made by the United States surveyor that any discussion of the merits of the case is unnecessary. There can be no serious contention to the contrary under the evidence. The surveyor was an official of the United States government, and acted in that capacity, and not as the agent or attorney of the Hope lode claimants. His function and orders were to survey the Hope lode claim. He had to determine the situs and boundaries thereof from the certified copy of the location notice, and from an examination of the ground and the markings on the surface. He followed certain misinformation, instead of the location notice, and by doing so left part of the Hope ground out. Respondent now asks us to deprive plaintiff of its property because of this error of the surveyor, —not the fault of the plaintiff at all,—and to do this despite the fact that, as soon as the mistake was known, all possible means and expedition were used by plaintiff to rectify it so as to preserve to plaintiff its claim as the same had been located, and as it should have been surveyed by the surveyor. We decline to lend the judgment of the court to any such result.

The evidence not only positively disproves any abandonment by the plaintiff of the ground in question, but it shows

every intent and wish to retain it, and we know of no principle of law by which the owner of a mining claim seeking a patent can be deprived of his property because of an error by a United States surveyor in the survey, which the owner in good faith takes steps to cure, and does cure, by permission of the interior department within a few days after his discovery of its existence. Respondent was a trespasser when he went on the ground included within the limits of the Hope, and by no act of the appellant has he ever acquired any other attitude against it.

Reversed, and remanded for a new trial.

THE MT. ROSA MINING, MILLING & LAND CO. v. J. S. PALMER.

(26 Colorado 56; 56 Pac. 176. Supreme Court. February 8, 1899.)

A verdict and findings are presumed to be sustained by the evidence where it is not preserved in the bill of exceptions.

[1]**Location of lode within placer.** A placer location and patent confers neither title nor right of possession to lodes and veins known to exist within its limits at the time patent is applied for, and a subsequent locator of such lode or vein is not a trespasser upon the rights of the placer locator.

Quiet title lies on possessory claim. A locator of a lode mining claim acquires an estate and interest in real property and is treated as the owner in fee as to every one except the United States and has such title as will support an action to quiet title under Section 255 of the civil code.

[2]**Width of lode claim within placer.** Section 2333, U. S. Rev. Stats., fixing the width of a lode claim within the boundaries of a placer claim at twenty-five feet on each side of the vein applies not only when the lode is located by the placer claimant, but applies as well to others who locate a lode within the boundaries of a previously located placer.

Appeal from District Court, El Paso County.

Action by J. S. Palmer against the Mt. Rosa Mining, Milling & Land Company to quiet title. There was a judgment for plaintiff, and defendant appeals. Reversed.

A. T. GUNNELL, WM. C. ROBINSON and GEORGE L. HODGES, for appellant.

B. F. & W. S. MONTGOMERY, BRUCE GLIDDEN, and J. H. MAUPIN, for appellee.

[1]*Reynolds* v. *Iron Silver Co.* 15 M. R. 591. *McCarthy* v. *Speed*, 19 M. R. 615. *Aurora Lode* v. *Bulger Hill Placer*, 23 L. D. 95. *Scott's Star Lode*, 20 L. D. 204.

[2]*Shonbar Lode*, 3 L. D. 388.

CHARLES CAVENDER, JOHN M. MAXWELL, JOHN A. EWING and THOMAS, BRYANT & LEE, *amici curiae.*

GODDARD, J. This is an action instituted by the appellee, plaintiff below, against appellant, the Mt. Rosa Mining, Milling & Land Company, defendant below, to quiet his title to two lode mining claims situate within the exterior boundaries of a certain tract of land conveyed to appellant by a government patent, as placer mining ground.

Upon the trial, it was admitted that the lode claims were formally and regularly located as provided by law, except as to the discovery of mineral therein; that affidavits in lieu of labor, for the years subsequent to their location, were properly filed by the owners; that by proper conveyances the plaintiff became, and was, the owner of whatever title had been acquired by virtue of such locations.

It was further agreed that the placer owned by the defendant was located some time prior to the location of the lode claims; that the application for a patent was not made until after their location; that the defendant, through proper conveyances, was the owner of the placer.

The only questions of fact that remained in dispute were whether or not a vein or lode was discovered and known to exist in the Handy Andy and Newman claims within the boundaries of the Mt. Rosa placer, at the time appellant applied for patent for such placer, on August 18, 1892. The court, though sitting in the exercise of its equity jurisdiction, called a jury, to which it submitted these questions. Their answers were in the affirmative, and were adopted by the court as a part of its findings; and thereupon, and from a consideration of all the evidence introduced, the court found that the facts established were substantially these:

That the grantors of plaintiff, on March 18 and April 5, 1892, entered upon the land included within the exterior boundaries of the Mt. Rosa placer, and located, respectively,

the Handy Andy and Newman lode mining claims, upon discoveries of mineral bearing rock in place, within the boundaries of said claims, and subsequently performed all acts necessary to complete a valid location of said claims; that, by duly executed and recorded deeds of conveyance, plaintiff became vested with all right, title, and interest in and to the same; that on November 7, 1892, the Mt. Rosa Mining, Milling & Land Company made application, in the proper United States land office, for a patent for the Mt. Rosa placer mining claim, and on April 24, 1893, the patent therefor was issued, and it thereby became, and is still, seised of all the right, title, and interest to the tract of land described therein; and found, as conclusions of law, that the Handy Andy and Newman lode mining claims, respectively, had been duly discovered, located, and recorded, within the exterior boundaries of the tract of land described in the Mt. Rosa placer patent, before the time of said application; that the ground described in said lode mining claims was excepted out of the land described in, and conveyed by, the placer patent; that the plaintiff was, at the time of the commencement of this action, and still is, entitled to the possession of the ground described therein; and entered judgment in favor of plaintiff for the possession of the ground in dispute, enjoining defendant from asserting any interest adverse thereto, and for costs. To reverse this judgment, the company brings the case here on appeal. Error is predicated upon the refusal of the court to give certain instructions, asked for by appellant, defining what constitutes a lode or vein of mineral, under the statute. We think this subject was properly covered by the instructions given, and that therein the court gave the generally accepted definition; and also stated the necessary conditions that would constitute it a known lode, under section 2333, Rev. St. U. S. The evidence not being preserved in the bill of exceptions, we must presume it was sufficient to sustain the answers of the jury and

findings of the court that lodes were discovered and known to exist within these respective locations prior to the application for patent. But counsel for appellant contend that, notwithstanding this, appellee cannot maintain this action, for two reasons: First, because, appellant having made a valid location of the ground as a placer claim, it was entitled to the exclusive possession thereof, and the entry of plaintiff's grantors thereon was wrongful, and no possessory right to the lodes was acquired thereby. Second, that if, notwithstanding such wrongful entry, valid locations of the lodes were made, the title thereby acquired is not sufficient to support an action to quiet title. It is undoubtedly true that, when a locator perfects a valid location to a lode or placer mining claim, he is entitled to the exclusive possession and enjoyment of the lands located, for all purposes granted by the act of congress. In the case of a lode location, the land located is segregated from the public mineral domain of the government, and the grant confers upon the locator the exclusive right of possession and enjoyment of the surface, and any lode the top or apex of which is within its surface boundaries (Rev. St. U. S. § 2322); and, so long as he complies with the requirements of the act, he can protect his possession of the surface of his claim, as well as such lodes, from invasion by any subsequent lode or placer locator. *Manuel* v. *Wulff*, 152 U. S. 505, 14 Sup. Ct. 651; *Armstrong* v. *Lower*, 6 Colo. 393; *McFeters* v. *Pierson*, 15 Colo. 201, 24 Pac. 1076; *Seymour* v. *Fisher*, 16 Colo. 188, 27 Pac. 240; *Belk* v. *Meagher*, 104 U. S. 279; *Gwillim* v. *Donnellan*, 115 U. S. 45, 5 Sup. Ct. 1110.

On the other hand, those provisions of the statute that give the locator of a placer the right to locate and patent all other forms of mineral deposit included within the surface boundaries of his claim expressly except therefrom veins of quartz or other rock in place, known to exist within its limits. Rev. St. U. S. §§ 2329, 2333. Such lodes, therefore, are not

the subject of a placer grant; and a placer location does not operate to confer the title or possession thereof upon the placer claimant, or withdraw them from subsequent location by others. In other words, *the placer location gives a qualified possession of the ground located;* that is to say, it confers upon the owner the exclusive right of possession of the surface area, for all purposes incident to the use and operation of the same as a placer mining claim, and all unknown lodes or veins, but does not give right of possession to known lodes or veins within its limits. The right to the possession of such lodes or veins can be acquired only by locating them as lode claims. 1 Lindl. Mines, § 413; *Aurora Lode* v. *Bulger Hill & Nugget Gulch Placer,* 23 Land Dec. Dep. Int. 95; *Reynolds* v. *Mining Co.* 116 U. S. 687, 6 Sup. Ct. 601.

It has been uniformly held that a patent for a placer claim does not convey title or right of possession to the patentee to any lodes known to exist therein at the date of application; that, if he desires to obtain such title and possession, he must comply with the provision of section 2333, and patent them as lode claims. In *Reynolds* v. *Mining Co., supra,* Justice Miller, who delivered the opinion of the court, speaking upon this subject, said:

"We are of opinion that congress meant that lodes and veins known to exist when the patent was asked for should be excluded from the grant, as much as if they were described in clear terms. It was not intended to remit the question of their title to be raised by some one who had or might get a better title, but to assert that no title passed by the patent in such case from the United States. It remains in the United States at the time of the issuing of the patent, and in such case it does not pass to the patentee. He takes his surface land and his placer mine, and such lodes or veins of mineral matter within it as were unknown; but, to such as *were known* to exist, he gets by that patent no right whatever."

Since a patent conveys to the placer locator no other or dif-

ferent rights than those acquired under the location, it inevitably follows, from the doctrine thus announced, that he has no possession, and acquires no right to any lodes known to exist within his claim, by virtue of his placer appropriation.

In *Aurora Lode* v. *Bulger Hill & Nugget Gulch Placer, supra*, Secretary Smith, in discussing the rights acquired by the placer locator, said:

"Such a location, in and of itself, does not establish any right in the claimant under it to the superficial area within its boundaries, except as a placer claim or mine. Of its own force, it cannot operate to give title to or property rights in any veins or lodes within its boundaries. True, a placer mining claim becomes property, as such, by discovery and location, the same as a vein or lode claim; but it cannot and does not, of itself, in any sense, give title to or property rights in veins or lodes; nor can it, in my judgment, operate to preclude a subsequent lawful discovery and location of veins or lodes within its boundaries."

And Mr. Lindley, in his admirable work on Mines, after an elaborate and thorough discussion of the question, deduces the following conclusions: "(1) A perfected placer location does not confer the right to the possession of veins or lodes which may be found to exist within the placer limits at any time prior to filing an application for a placer patent; (2) such lodes may be appropriated (a) by the placer claimant, or (b) by others, provided the appropriation is effected by peaceable methods and in good faith."

While we recognize to its full extent the rule that precludes the initiation of a right through a trespass upon the lawful possession of another, we think, under the established facts in this case, appellant is not in a position to invoke its protection. The lodes in question were known to exist prior to the application for patent, and appellant not having taken the necessary steps to obtain possession of them, they were open

to location by others at the time they were located by the grantors of appellee. In making the locations, no right of appellant was invaded, and their validity, therefore, is in no way affected by the fact that they were made within the surface boundaries of a prior placer location.

In support of the second proposition, it is urged by counsel for appellant that the mere possessory title to mining claims is not sufficient to support the action provided for in section 255 of the Civil Code. This section enacts that:

"An action may be brought by any person in possession, by himself or his tenant, of real property, against any person who claims an estate therein adverse to him, for the purpose of determining such adverse claim, estate or interest."

The estate acquired by the locator of a mining claim is an interest in real property, and, although the paramount title remains in the government, the courts have universally recognized such interest as a freehold, and in all controversies arising between the locator and other persons, as to any right or claim thereto, he is treated as the owner in fee. *Merced M. Co.* v. *Fremont,* 7 Cal. 317; *Hughes* v. *Devlin,* 23 Cal. 502; *Merritt* v. *Judd,* 14 Cal. 60; *Roseville Alta Mining Co.* v. *Iowa Gulch Min. Co.,* 15 Colo. 29, 24 Pac. 920; *Forbes* v. *Gracey,* 94 U. S. 762.

As was said in *Hughes* v. *Devlin, supra:* "Although the ultimate title in fee in our public mineral lands is vested in the United States, yet, as between individuals, all transactions and all rights, interests, and estates in the mines are treated as being an estate in fee, and as a distinct and vested right of property in the claimant or claimants thereof, founded upon their possession or appropriation of the land containing the mine. They are treated, as between themselves and all persons but the United States, as the owners of the land and the mines therein."

Such being the character of the locator's title, it is obvious that the foregoing provisions of the code are as applicable to

mining claims as to any other real property, and his right to avail himself of the remedy therein provided is too clear to admit of dispute. *Dahl* v. *Raunhein,* 132 U. S. 260, 10 Sup. Ct. 74; *Perego* v. *Dodge,* 163 U. S. 160, 16 Sup. Ct. 971; *Noyes* v. *Mantle,* 127 U. S. 348, 8 Sup. Ct. 1132; *Gillis* v. *Downey,* 29 C. C. A. 286, 85 Fed. 483.

Another, and more serious, question is presented, and that is as to the amount of surface ground appellee is entitled to, if any, under and by virtue of his lode locations. The court below awarded him the full amount claimed, to wit; 300 by 1,500 feet, in each of the claims. It is insisted by counsel for appellant that he is entitled to only the mineral lodes, and not to any of the surface of the placer ground.

This precise question has never, to our knowledge, been discussed or determined by a court of final resort. It has, however, been passed upon by the land department; but its rulings are not uniform. In the case of the *Shonbar Lode,* 1 Land Dec. Dep. Int. 551; s. c. 3 Land Dec. Dep. Int. 388, Secretary Teller ruled that, the lode claimant having failed to adverse the placer application for patent, he was restricted to his lode and 25 feet of surface on each side thereof. Subsequently, and after the decision in the case of *Noyes* v. *Mantle,* 127 U. S. 348, 8 Sup. Ct. 1132, Assistant Secretary Chandler held, in the case of *Pike's Peak Lode,* 10 Land Dec. 200, that the limitation of the width of a lode claim in section 2333 was only applicable where the placer claimant sought to patent the lode, and had no application to a lode claim perfected by another; that in the latter case the lode claim, in its full extent, should be excepted from the placer patent. It does not appear from the statement of this case whether the lode claim was located prior to the placer or not; but we infer, from the fact that the secretary quoted from, and relied upon, the decision in the case of *Noyes* v. *Mantle, supra,* as supporting this conclusion, that the lode claim was the prior location. While, in

the case of *Aurora Lode* v. *Bulger Hill & Nugget Gulch Placer, supra,* Secretary Smith held that the lode location did not carry with it any more surface ground than was necessary for the use and enjoyment of the lode. But this conclusion seems to have been influenced largely, if not altogether controlled, by the peculiar conditions of that particular claim, and the fact that the placer claimant had obtained judgment in an adverse proceeding theretofore instituted against an application by the lode claimant for a patent.

The question was also involved upon the trial of the case of *Campbell* v. *Mining Co.*, in the circuit court of the United States, for this district, Judge Riner presiding. He entertained the view, and instructed the jury to the effect, that a lode claimant, in case of a recovery, was entitled to no more than the vein or lode, and 50 feet of ground, extending 1,500 feet in length.

We think this instruction correctly defines the amount of surface ground to which a lode located within the boundaries of a placer is entitled, under the provisions of section 2333. As was said in *Reynolds* v. *Mining Co., supra*: "This section made provision for three distinct classes of cases: (1) When the applicant for a placer patent is at the time in possession of a vein or lode included within the boundaries of his placer claim, he shall state that fact; and, on payment of the sum required for a vein claim and twenty-five feet on each side of it, at $5 per acre, and $2.50 for the remainder of the placer claim, his patent shall cover both; (2) it enacted that, where no such vein or lode is known to exist at the time the patent is applied for, the patent for a placer claim shall carry all valuable mineral and other deposits which may be found within the boundaries thereof; (3) but, in case where the applicant for the placer is not in possession of such lode or vein within the boundaries of his claim, but such vein is *known to exist,* and it is not referred to or mentioned in the claim or patent, then the *application shall be*

construed as a conclusive declaration that the claimant of the placer mine has no right to the possession of the vein or lode claim."

We think it is manifest that the lode or vein referred to in the first and third provisions is the same thing, and that whatever a placer claimant would acquire by availing himself of the privilege accorded him by the first provision of the section, is reserved by virtue of the third provision; in other words, that the same extent of surface ground that is incident to such lode or vein, if located and patented by the placer claimant, is reserved from the placer patent in case of his failure to claim and patent the same. If he elects to patent the lode, he is required to take 25 feet on each side of the center of the vein, and pay therefor at the rate of $5 per acre. This is a privilege accorded to him, which he may avail himself of, or not, as he sees fit. If he elects to waive this privilege, he may do so in one of two ways; either by expressly excepting the lode from his placer location and application for patent, or remain silent in regard to it. If silent, then by implication he declares that he makes no claim to such lode; and by such silence is bound to the same extent, and in the same manner, but no further than he would have been by an express declaration. By electing to make no claim to a known lode, or express declaration in regard to it, he must be understood as claiming, for placer purposes, the greatest possible area within the boundaries of his placer claim, and should be held to have relinquished only that which he might have taken, which is the lode, with the amount of surface ground provided. Why should there be any difference between the rights of claimants of known lodes within the boundaries of a placer? We know of none. The object of excepting known lodes from placer locations was to prevent titles to such lodes being obtained under the guise of a placer, at the same time, in order to protect claimants to each character of mineral locations to the greatest extent,

and preserve to each that which was most valuable for particular purposes in connection with each class of claims. The lode, for convenient working, could not be limited to less than 25 feet on each side of the center of the vein; and the placer, which would be valueless without such surface rights, is permitted to take title to the remaining area accordingly. Those who controvert this view base their contention upon the provisions of section 2320, which it is said governs the length and width of all lode claims, whether made within the boundaries of a placer claim or not.

An act on a particular subject must be construed as a whole. Section 2320 refers to the location of lodes not conflicting with any other class of mineral locations; while by section 2333 special conditions with reference to conflicts between the two classes of mineral claims are specially provided for, and, to that extent, construing the act as a whole, is a limitation or qualification of the provisions of section 2320, which relates, as stated, to the width of lode claims generally, and regulates the width of lode claims when made upon lodes within the boundaries of a placer, whether such lodes are located by the owner of the placer or strangers to that title. By this construction, full force and effect is given to both of these sections, and the purpose of the statute is carried out. The government receives for its mineral lands the price fixed for lodes and placers, respectively, and the superior right to the surface area of the placer claimant, acquired by his prior location or patent, is protected. It is the conclusion of a majority of the court that the limitation of the width of a lode claim in section 2333 is not only applicable to the placer claimant, but applies as well to others who locate a lode within the boundaries of his previously located placer.

Chief Justice Campbell declines to express an opinion upon this question, because, in his judgment, the stipulation entered into by counsel eliminates it from the case.

It follows that the court below erred in adjudging to appellee surface ground in excess of 25 feet on each side of the lodes in question. For this reason, the judgment is reversed, and the case remanded, with directions to enter judgment in accordance with the views we have expressed.

Reversed.

JAMES W. OAKFORD v. FRANCES A. HACKLEY.

(92 Federal 38. U. S. Circuit Court, W. D. Pennsylvania. February 9, 1899.)

[1]**Negotiations leading to promise of coal lease.** Evidence considered, and *held* insufficient to justify the refusal of an owner of land to perform an agreement to execute a coal lease thereon, on the ground of fraud and misrepresentation.

Fault. Measure of damages at law too uncertain. A valid agreement, definite, and fair and reasonable in its terms, was made for the lease of a tract of coal land, to be mined by the lessee. The lease would necessarily extend through a number of years. The quantity to be mined each year was uncertain, and payment of a royalty was to be made to the owner according to a sliding scale, varying from year to year. Owing to a known fault in the vein, but the extent of which was unknown, the total quantity of coal to be mined was very largely a matter of uncertainty. *Held*, that specific performance of the agreement would be decreed at suit of the lessee, on the ground of the inadequacy of his remedy at law for nonperformance, arising from the impossibility of determining the amount of his damages with any reasonable degree of certainty.

This was a suit in equity, by James W. Oakford against Mrs. Frances A. Hackley, to enforce the specific performance of an agreement to enter into a lease of certain coal lands owned by defendant.

[1]A preliminary contract to give lease need not cover details which are to be filled in according to customary usage. *Cochrane* v. *Justice M. Co.* 16 Colo. 415; 26 Pac. 780.

Specific performance barred by plaintiff's acts in preventing examination. *Hill* v. *Rich Hill Co.* 119 Mo. 9; 24 S. W. 223.

Vendee must tender balance and make demand for accounting (where he is entitled under agreement to certain proceeds) before filing his bill. *Clarno* v. *Grayson*, 30 Oreg. 111; 46 Pac. 426.

Specific performance refused where defendant had divested himself of title by conveyance to his wife. *Brown* v. *Lapham*, 22 Colo. 264; 44 Pac. 504.

Where land sold and price partly paid vendor has the right to specific performance, his remedy at law being inadequate. *Maryland Clay Co.* v. *Simpers*, 96 Md. 1; 53 Atl. 424.

Where the price has been specifically fixed equity will not treat

SAMUEL B. PRICE, for complainant.

JAMES E. BURR, H. W. PALMER, and ROBERT G. INGERSOLL, for defendant.

BUFFINGTON, District Judge. This is a bill to enforce specific performance of an agreement for a lease of coal land in Lackawanna county. The bill was filed in the court of common pleas of that county, and by the respondent, a citizen of the state of New York, removed to the circuit court. The proofs show that Frances A. Hackley, the respondent, by the will of her husband, who died in the summer of 1894, became the owner in fee of 150 acres of land situate in Lackawanna county, known as the "Thomas Bell Tract," and underlaid with anthracite coal. By letter of attorney, dated August 1, 1894, Mrs. Hackley constituted Judge William H. Jessup, of the city of Scranton, her attorney. On August 30th, Judge Jessup wrote Mrs. Hackley in reference to the Bell tract as follows:

"I have had applications for the leasing of the 150-acre tract of Thomas Bell. * * * It occurs to me that it would be a very good time to get the 150 acres leased now. There are not many tracts that are not under lease, and of course, the sooner you get your tract under lease, the sooner you will be realizing from it. The borings that were made, of which I found among the papers the reports, would seem to show that quite an extensive fault exists in the tract, and under a portion of it there was no coal. As to whether any recent developments in the vicinity have changed this, it would be well for us to find out before making any definite arrangements; and, above all, it is worth more to you to have thor-

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it as excessive where there was no suggestion of fraud or deception. *Id.*

Specific performance will not be enforced of a unilateral oil lease. *Federal Co.* v. *Western Co.* 121 Fed. 674.

The party seeking specific performance must state the consideration, but the burden of proving that it was inadequate is on the defendant; sufficiency of consideration considered and held adequate. *Finlen* v. *Heinze*, (Mont.) 73 Pac. 123.

oughly reliable men to deal with, as it may run as long as you live, perhaps, than even to get a little better price from unreliable men, and being continually annoyed. That is my experience, and I know it was the experience of your husband, Col. Hackley; and I know, for that reason, he declined to negotiate with certain parties with reference to the property."

The reference to the report in this letter is to maps of borings which were found among the papers of Col. Hackley at the time of his death, by Judge Jessup, concerning which he testified as follows:

"The two maps of borings I told Mrs. Hackley I would bring home with me, because in future leasing of the Thomas Bell tract, they would be important to show the parties who might desire to lease the land and the coal there was on it."

Additional letters were written by Judge Jessup to Mrs. Hackley, which were not put in evidence by either party; but on October 23d she wrote the judge as follows:

"Dear Sir: Your letter of the 16th instant, and also your telegram of yesterday, came duly to hand. * * * Note what you say in regard to the Thomas Bell tract, and will be glad to receive proposals for lease, which will have my immediate attention."

It should also be noted that Judge Jessup testified as follows:

"I had several talks with Mrs. Hackley, but I told her my advice would be, if she was anxious to be freed from annoyances and trouble of business, and as her property consisted of the Archbald property, which was then under lease, and this Thomas Bell tract in Pennsylvania,—that my advice would be to get both of them under long-term leases at the earliest date, so that she would know to a certainty what would be her regular income; and, as she had some matters in view in the way of charities, which she then talked about, she would thus know how much she could give to charity, or any object she pleased; and that was my advice to her. She seemed to consent to that."

The Archbald property was then under lease, but a renewal of the lease was arranged for by Judge Jessup, and

executed by Mrs. Hackley. On the 27th of October, Oakford, the plaintiff, made an offer to lease the coal by the following letter:

Scranton, Pa., Oct. 27th, 1894.

"To Hon. Wm. H. Jessup, Att'y for Mrs. Frances A. Hackley:

"I hereby offer to lease from you all the merchantable and minable coal in, under and upon the Thomas Bell tract of land, in Lackawanna county, Pennsylvania, at the following rents, or royalties, viz.: For the first two (2) years, forty-two (42) cents for prepared sizes, one-half (½) of the price of prepared sizes for pea, and one-fourth of the price of prepared sizes for buckwheat, and one-eighth (⅛) of the price of prepared sizes for birdseye and culm, if sold and removed from the demised premises. After two years from date of leases, the royalty on prepared coal to increase at the rate of one (1) cent per annum up to a maximum of fifty (50) cents, and the smaller sizes proportionately. Lease to contain usual mining privileges and a reasonable minimum.

"[Signed] J. W. Oakford."

On November 8th, Judge Jessup took this offer to New York City, and submitted it to Mrs. Hackley, and, after consultation, the following acceptance was appended to the offer:

"I accept the above offer, and direct W. H. Jessup to draw up the proper lease for the coal mentioned.

"Nov. 8, 1897. Frances A. Hackley."

On the same day Judge Jessup wrote Mr. Oakford as follows:

"Dear Sir: I write to inform you that your proposal to lease the coal on a part of the Thomas Bell tract owned by Mrs. Hackley is accepted by her, and I am directed to prepare a proper lease for the same. The acceptance is predicated upon the signing of such lease as I shall advise her to prepare.

"Very truly yours,

"W. H. Jessup, Attorney for Mrs. F. A. Hackley."

Subsequently Judge Jessup prepared a lease, which is printed as Exhibit C to plaintiff's bill, and on the 26th of

November, 1894, the same was executed by Mr. Oakford. Without now going into detail, it is sufficient to state that respondent refused to execute the lease. Her position with reference thereto, for present purposes, is summarized by her answer to the request of Mr. Oakford for its execution, embodied in a letter, dated December 24, 1894, in which he says:

"(1) Have you any modifications of the present lease to suggest, which would make you willing to execute it? (2) If not, on what do you base your refusal to sign the lease with me?"

And her answer thereto, dated December 27th, as follows:

"In answer to your first question, I will say that, if I were going to sign the lease with you, there are many alterations which I should wish made; but, under all the circumstances, I am unwilling to sign the lease, however modified or amended. In answer to the second question, I will say that, on account of the painful misunderstanding and unpleasant feeling associated with the matter, I cannot conscientiously sign the lease according to the agreement, which I signed under a great misunderstanding of the facts."

An examination of the proofs in this case shows a specific offer to lease a body of ascertained coal upon definite terms, the acceptance of that offer in writing by the defendant, an authorization by her to her counsel to prepare a proper lease, notification to the plaintiff of the acceptance of the offer, preparation of the lease by the respondent's counsel, execution thereof by the plaintiff, and refusal on the part of the respondent to execute the lease. No specific objections are made to the form of the lease, but the refusal to execute is on the ground that the agreement was made under "a great misunderstanding of the facts." The conditions and essentials prerequisite to jurisdiction and the entry of a decree for specific performance are all here found, unless the allegation of misunderstanding of facts is established. Such misunderstanding must, if it existed, have arisen in the case by rea-

son of the acts of Oakford, the lessee, Mrs. Hackley, the lessor, or Judge Jessup, her attorney.

Misconduct on the part of Oakford, the purchaser, is urged in three particulars: (1) That he secured the lease by undue influence exercised, and misconduct on the part of Judge Jessup, by association with himself in the lease, or offering to associate Judge Jessup's son, W. H. Jessup, and thereby procured a lease less favorable to Mrs. Hackley than other bidders would have entered into if they had been fairly treated; (2) that he concealed from Mrs. Hackley the fact that one J. N. Rice, a person objectionable to Mrs. Hackley, was associated with him in the lease; (3) that he represented to Mrs. Hackley that her relative, Joseph B. Dickson, was associated in the lease, and thereby procured her consent.

The first contention is not sustained by the proofs. While it is true that Mr. Oakford, who was a personal friend of young Mr. Jessup, did, during the preliminary stages of the negotiations, suggest to him that there might be an opportunity for him to take an interest in the lease, yet this offer or suggestion was, as it properly should have been, declined by Jessup.

As to the second contention, the fact that Mr. Oakford did not disclose Dr. Rice's connection with or interest in the proposed lease cannot fairly be attributed to any motive on his part to deceive Mrs. Hackley. There is no evidence whatever that he knew Dr. Rice was distasteful to Mrs. Hackley. Dr. Rice testifies that he had no knowledge of the fact that he was objectionable to Mrs. Hackley, or her deceased husband. His testimony shows that he and Judge Jessup had had some controversy or trouble and that he feared, if he made the application for the lease to Judge Jessup, he would not receive as fair treatment as other bidders; and, knowing that Mr. Oakford was friendly with Judge Jessup, he procured him to negotiate the lease. We are therefore convinced that the

facts proven in reference to this second contention show no impropriety or misconduct on the part of Mr. Oakford.

As to the third contention, of Dickson's alleged interest in the lease, the proofs fail to show that any allegations in regard to such interest induced any action by Mrs. Hackley. They show that no alleged or supposed interest of his in the lease was known to Mrs. Hackley on November 8th, when, by indorsement on Oakford's offer, she agreed to the giving of the lease. It therefore could have been, and was, of no effect in leading her to an agreement to give the lease. The first intimation to her of any such fact was conveyed in a letter of Judge Jessup to her, dated the 21st of November, which, after citing the preparation of the lease, and that Mr. Oakford would be in New York the next day to execute it, says:

"I understand he expects Mr. Dickson, of the firm of Dickson & Eddy whom I believe you know very well, to be interested with him in this enterprise. Mr. Dickson will call upon you with Mr. Oakford, when the lease will be all ready to execute, and I think they are as near like the lease which was executed last week as the nature of the property will admit of."

It will therefore be seen that the fact of Mr. Dickson's connection with the lease could not have been an element in inducing Mrs. Hackley to sign the agreement of November 8th.

The proofs satisfy us, also, that no misrepresentation was made to Mrs. Hackley in that respect by either Mr. Oakford or Judge Jessup. The fact was that the Ontario & Western Railroad Company was interested in securing this lease, and in transporting the Bell coal to market. To that end it had agreed to furnish a substantial part of the funds necessary to its development. See letter of J. E. Childs, dated October 22, 1894, which is as follows:

"New York, Oct. 22, 1894.

"Dr. J. N. Rice, Scranton, Pa.—Dear Sir:—Referring to our conversation at this office last Saturday, I have conferred with President

Fowler, and he approves of the proposed arrangement. The company will loan two-thirds of the money necessary to start the operation,—this loan not to exceed fifty thousand, and subject to the usual conditions in relation to security and repayment.

"Yours very truly, [Signed] J. E. Childs, General Manager."

Mr. Dickson was the sales agent of that company's coal, and was interested in the way of commissions in the sale thereof. Under the circumstances, we see no impropriety whatever, under the proofs of this case, in Mr. Oakford, who was not personally acquainted with Mrs. Hackley, requesting Mr. Dickson to accompany him to see her when he went to have the lease executed in duplicate; nor was the fact that he should accompany one calculated to mislead Mrs. Hackley. Indeed, the fact that Oakford requested Dickson to go to Mrs. Hackley, and that Judge Jessup informed her before either came of the fact that Dickson was interested in the lease, shows that no impropriety was intended or undue influence to be exerted thereby on Mrs. Hackley. If the fact of Mr. Dickson's alleged interest was to be used as a lever to procure Mrs. Hackley's assent, and in point of fact he had no interest whatever in the lease, then assuredly Judge Jessup and Mr. Oakford, by placing Mr. Dickson face to face with Mrs. Hackley, were affording her means of obtaining the best possible proof of misconduct on their part. We are, therefore, of opinion that, so far as Mr. Oakford is concerned, no act or omission has been shown on his part which would affect his right to a specific performance of this contract.

Turning, now, to the conduct of Judge Jessup, the allegation is made that in the making of the lease he was unfaithful to the interest of his client, and that he misrepresented the facts to her, and either wilfully or carelessly failed to secure for her a higher royalty for her coal than Mr. Oakford's offer. This charge is a serious one, affecting, as it does, the integrity of a member of the bar, of long standing,

who has enjoyed the confidence of his fellow men. It is a charge that should not be lightly or unadvisedly made, and which should not be found by a court to be true, except upon clear and convincing proof.

After a careful consideration of these proofs, we have reached the conclusion that there is nothing which in any way impugns the integrity of Judge Jessup in the leasing of this land, and we are of opinion he acted throughout in perfect good faith. That a mistake may have occurred may be conceded, and that it may be possible that, if other bidders had known what Oakford had offered, they would have bid more; but, if such is the case, these facts were not occasioned by any lack of good faith, or improper conduct on the part of Judge Jessup. In the first place, he made an effort to secure all possible lessees. He testifies that, among others, he interviewed Mr. Jermyn, Mr. Connell, Mr. Hand, and M. S. Kemmerer of Mauch Chunk. None of these men are called to contradict him. The last named examined the borings, and Judge Jessup says:

"I explained to him that Mrs. Hackley had accepted a bid of forty cents a ton for the re-leasing of the Archbald property, but that her ideas were very high in reference to the value of this property, and whoever would bid for it would have to bid very high."

He says he told the same thing to Mr. Oakford and to Mr. Sturges, who contemplated putting in a bid for the Dolph Coal Company. The alleged trouble or misconduct is said to have arisen in what Judge Jessup said to Mr. Sturges. The allegation is that Judge Jessup conveyed the idea to him that a 40-cent royalty was all Mrs. Hackley wanted, and that, if the Dolph Coal Company would bid that amount, they would get it. Mr. Sturges' version of the negotiations is as follows:

"When I came back, I went into Judge Jessup's office, and told him that I understood that he was attorney for Mrs. Hackley, and

that the Dolph Coal Company wanted to lease the Thomas Bell tract whenever she was inclined to do it, and asked him whether she was ready to lease. He said he thought she was; that she wanted to get her properties paying royalties. * * * Then I asked him what royalties she would want for it. His answer was that she had just closed a contract with Messrs. Jones and Williams for renewal of their lease of their tract at 40 cents, the amount to be increased after two or three years, I think; and he thought she would want the same for the Bell tract. I told him that I thought it was too much, that this tract was nothing like as valuable as the Jones and Williams tract, that the acreage was very much smaller, that probably there was only one good vein, and that there was an extensive fault supposed to run across it. He said he knew that. They had had an examination made, and in their judgment there was something like one hundred acres only, and he gave me figures. He thought there would be between six and seven hundred thousand tons, which agreed with what we had estimated. I told him that the Dolph Coal Company wanted it; that our headings ran almost alongside it for nearly half a mile, as I understood; that we could get into it within a week, or some short time (I think within a week), and commence paying royalties at once, but that the royalty for the land was high, and whether the Dolph Coal Company would pay it, or not, I didn't know, but they would soon have a meeting, and I would bring the matter before them, and see whether they would pay it. He said, 'Very well,' and I left him. I should say, in this conversation, he didn't state, in any way, shape or manner, that they were taking propositions for mining this property, or that there was any competition, except he said there were two or three people inquiring about it. I knew there were dozens of people inquiring about every undeveloped coal tract in the valley. I left the office with the understanding, whether rightfully or wrongfully, that it was simply a question whether the Dolph Coal Company was willing to pay forty cents a ton. I didn't understand any one else was to bid, or that we were to offer any competitive bids. I didn't know there was any great haste about it, and didn't call any meeting, but waited for the regular meeting, which, I think, had been delayed that month. Some time afterwards, I think two or three weeks, I received this letter, which Judge Jessup has offered in evidence. I have the original here. You can compare it, if you want to:

"'Oct. 25, 1894.

"'E. B. Sturges, Esq.—Dear Sir: If the Dolph Coal Company desire to make a proposition for a lease of the coal on the Thomas Bell tract belonging to Mrs. C. B. Hackley, I would like to have them

make the best proposition they are willing to make for the coal, and also a statement as to what arrangement they will make in reference to the culm, and where the same will be deposited, as in any lease to be executed for this she will undoubtedly require that the culm shall be separated from other land, or such an arrangement made in reference to the same as she shall have the benefit of it."

"'[Signed] Jessup & Hand.'

"* * * There was nothing final about the thing at all. He gave me the impression that Mrs. Hackley would want forty cents a ton for that property, and, if the Dolph Coal Company would pay it, that they would get it. When I received this communication from Judge Jessup, I supposed that having been slow about the thing, he simply was hurrying me up. I still didn't understand that there was any competition, or that others were bidding, or that I was to make any bid; but I at once got a meeting of the Dolph Coal Company. He said he wanted answer that week. I find a record on my diary, that we held a meeting on the afternoon of the next day, and that Mr. Dolph and I were appointed a committee. I presented this matter to the Dolph Coal Company, and stated to them what Judge Jessup had said,—that, if we wanted that land, we had to pay forty cents for it, and a sliding scale. They thought it was too much. After a good deal of discussion, we decided to pay it, and Mr. Dolph and myself were appointed a committee to make the proposal to Judge Jessup. As I remember, the only change that we tried to get was that the price should not commence to raise until five years, instead of two. We thought that, at the rate named, the raise in two years was too quick. Immediately after the meeting (the same day), in accordance with their action, Mr. Dolph and I sent this communication, dated October 26, 1894:

"'Hon. W. H. Jessup, Attorney for Mrs. C. B. Hackley—Dear Sir: The Dolph Coal Company have authorized Mr. Edward Dolph and myself to make the following offer for the coal under the Hackley tract, adjoining the Dolph workings: Forty cents per ton for sizes above pea, the price to raise one cent per year after five years. For pea and smaller sizes, the price to be proportioned, on the ratio of the selling price, to that of larger sizes. Lease to contain the usual clauses as to returns, examination, weights, etc., and provide a fair annual minimum. An account will be kept of all culm dumped, the same to be accounted for when sold, or to be subject to Mrs. Hackley's order in any reasonable way.

"'Yours, respectfully, [Signed] E. B. Sturges,

"'For D. C. Co.'"

Witness, continuing:

"This communication was handed to Judge Jessup, or left in his office, and I heard nothing from it for at least two weeks,—more than two weeks. I had no doubt that the offer had been accepted, and that the lease had been made, or, at least, that if there was anything wrong about it, or unacceptable, I would hear from Mrs. Hackley or Judge Jessup at once; but I refrained still from communicating with Mrs. Hackley in any way. And I want to say right here,—I don't want to be misunderstood,—Judge Jessup didn't say that her price would be forty cents a ton, but that she had made a lease to Jones and Williams at forty cents, and he presumed she would want the same for this land. He didn't say that forty cents would be her price, but I understood that was her figure, and that, if we offered that, we would get it."

Judge Jessup's version is this:

"Shortly after this Mr. Sturges called upon me, and said he was interested in the Dolph Coal Company; that he understood that Mrs. Hackley desired to lease this property; that their property adjoined the Thomas Bell tract on one side. I showed him the report of the borings upon the Thomas Bell tract, and told him the same thing which I had told Mr. Kemmerer and Mr. Oakford. He said that, as they adjoined this property, it was more to them than it was to anybody else, for they could mine the coal from this property without making any additional improvements; and he said that, if they could get a lease, they could be delivering coal within six weeks from the time they got their lease. He showed me, upon the map, which side their property adjoined this property,—I don't now remember which side it was,—and, after talking with him, I told him that Mrs. Hackley had accepted a proposition to lease to Jones and Williams for forty cents; that I considered the Archbald lease a more valuable property than I did this, because it was a larger property; but I told him Mrs. Hackley's views were very high in reference to this matter, and whoever got it would have to bid very high. I told him that there were two other gentlemen that I knew who proposed to bid upon the property, and, after talking with him some little time, he said, 'We can afford to give more for that property; I will make my best bid first,' and said, 'Whenever you are ready to receive bids, why, we will make a bid.' Shortly after I received this letter from Mrs. Hackley, which is dated October 24th and is marked 'Plaintiff's Exhibit A,' in which she said, 'Note what you say in regard to the Thomas Bell tract, and will be glad to

receive proposals for lease, which will have my immediate attention.' Immediately after the receipt of that letter, I notified Mr. Kemmerer, Mr. Oakford, and Mr. Sturges that Mrs. Hackley was ready to receive their proposals. I communicated with Mr. Kemmerer by telephone, and he asked who were expecting to bid for it. I told him Mr. Sturges and Oakford, so far as I knew; and he then said he had some business arrangements with the Dolph Coal Company, whom I knew Mr. Sturges represented, and he did not like to come into competition with them, for he wanted some favors from the Dolph Coal Company, and he was afraid he would not get them if he put in a bid against them, and was fortunate enough to get this property, and therefore he would withdraw, and not put in a bid at all. I also informed Mr. Oakford,—I think, personally,—and I wrote a letter to Mr. Sturges, and sent to his office, of which I have a carbon copy. * * * After receiving these offers, on the 8th day of November, I went to New York, taking with me the offer of Mr. Sturges and Mr. Oakford. I met Mrs. Hackley. I read to her the offer of Mr. Sturges, as I have read it here. I also read to her the offer of Mr. Oakford,—a better offer than that of Mr. Sturges, in that he was to give forty-two cents for the first two years; whereas Mr. Sturges was to give only forty cents a ton for the five years; that, as the Dolph Coal Company could immediately mine out the coal without any preparation, they would have the opportunity of mining the greater part of the coal, which was estimated at 650,000 tons, within five years, and could get it all for forty cents a ton, whereas the bid of Mr. Oakford was forty-two cents to start with, and, as he would be obliged to put on improvements to mine the coal, he would not be expected to get out any coal within a year, so that his price would increase at once beyond the forty-two cents within a year after he had started to mine; and that I considered she would get a good deal more money out of it by leasing to Mr. Oakford than to Mr. Sturges, for the reason that it would be to their interest to mine all the coal they could at forty cents within the five years, instead of allowing it to remain in the ground and mining it out at the increased rates. She agreed with me that it was better. She asked me if Mr. Sturges would not give any more. I told her what Mr. Sturges had said to me in the office,—that they could afford to give more than anybody else, and he would make his best bid first, and that I had requested Mr. Sturges to make his best bid first, and I supposed that was his best bid. From what I knew of Mr. Sturges I did not believe he would give any more. Upon this she accepted Mr. Oakford's bid, and I wrote upon the paper the following:

" 'I accept the above offer and direct W. H. Jessup to draw up a proper lease for the coal mentioned. Frances A. Hackley.

" 'Nov. 8, 1894.' "

In the first place there is an utter absence of motive shown on Judge Jessup's part to part with his client's interest at an undervaluation. What possible motive could he have in so doing? The contention that his son was, or was to be, interested in Oakford's lease, is without foundation. If the respondent's contention is correct, Judge Jessup, without any proven motive or inducement, deliberately sacrificed the interests of a client whose business he would naturally value, and that, too, in a way in which he would be almost sure to be detected. An analysis of the testimony shows, to our mind, that Judge Jessup's version of his statement to Mr. Sturges is correct. In the first place, he says he made the same statement, namely, that, while Mrs. Hackley had re-leased the Archbald coal for 40 cents, she wanted more for this, to Kemmerer and others. Mr. Oakford testifies that Judge Jessup did so tell him. Mr. Kemmerer is not called to contradict Judge Jessup, and, in the absence of such contradiction, we are safe in assuming Judge Jessup stated to him as he testified. Now, if he had told these facts to both these gentlemen, and invited them both to put in bids, for what plausible or possible reason, or upon what theory, would he induce Mr. Sturges to put in a 40-cent bid. If he wanted to give the property to Oakford, why should he try to have Mr. Kemmerer put in a larger bid, and thus defeat his purpose? Judge Jessup testifies, and he is confirmed by the absence of any contradiction on the part of Mr. Kemmerer, that, after receiving word from Mrs. Hackley, as noted in her quoted letter, that she was willing to lease the Bell tract, he notified Kemmerer, and requested a bid, and, in answer to his inquiry as to who the bidders were, was told they would be Sturges and Oakford. It then developed that Kemmerer did not want to antagonize the Dolph Coal Company, and so declined to bid. It will thus be seen that the effort of Judge Jessup to get a third bid for the property was defeated, not by any lack of desire on his part, but by reason of the Dolph

Coal Company. The letter of Judge Jessup to Mr. Sturges of October 25th, which is given in full above, is consistent with Judge Jessup's version of the previous conversation. It will be noted that he asks them to make "the best proposition they are willing to make for the coal." This is quite consistent with Judge Jessup's testimony that:

"I told him that there were two other gentlemen that I knew who proposed to bid upon the property, and, after talking with him some little time, he said, 'We can afford to give more for that property; I will make my best bid first,' and said 'Whenever you are ready to receive bids, why, we will make a bid.'"

The proof also shows that, however much they may have subsequently changed their minds, the bid put in was the most the Dolph Coal Company was at that time willing to pay. Mr. Sturges says that in his first talk with Judge Jessup he told him that:

"The royalty for the land was high, and whether the Dolph Coal Company would pay it, or not, I didn't know, but they would soon have a meeting, and I would bring it before them, and see whether they would pay it."

At the meeting where the matter was considered, he says:

"I presented this matter to the Dolph Coal Company, and stated to them what Judge Jessup had said,—that, if we wanted that land, we had to pay forty cents for it, and a sliding scale. They thought it was too much. After a good deal of discussion, we decided to pay it, and Mr. Dolph and myself were appointed a committee to make the proposal to Judge Jessup."

It would therefore seem that, as things then stood, the bid then made was the best the Dolph Coal Company was willing to do, and that they were not even willing to pay what Mr. Sturges says he understood would be necessary to secure the property, to wit, pay 40 cents, with a sliding scale after two years. They postponed the rise till five years. The substan-

tial difference between their bid and Mr. Oakford's may be thus illustrated: Assuming there were 600,000 tons in the tract, and it would be taken out in equal proportions through the 10 years, the average royalty paid by Oakford would be 46 cents, and by the Dolph Coal Company 41½ cents, which would make Oakford's lease net $27,000 in royalties more than Dolph's. Tested by the views of the members of the Dolph Coal Company,—and Mr. Sturges has testified to their views, freely expressed at the meeting, that a royalty of 40 cents, with a sliding scale after two years, was too high, and that they were only willing to pay a sliding scale rising after five years,—bearing in mind that, with its improvements ready for beginning operations at once, the price remained stationary for five years, and therefore, if the Dolph Coal Company got the lease, the bulk of the coal would be mined at 40 cents, it would seem that Judge Jessup had obtained an exceptionally fine price for his client's coal.

A careful scrutiny of the proofs satisfies us that Mr. Sturges not unnaturally fell into the mistake of supposing that he would get the coal cheaper than any one else. The Dolph headings ran alongside it for nearly half a mile, an entrance could be made within a few days, and their breaker, trackage, and other improvements used to mine this coal. It would therefore seem quite natural that in time the Dolph Company should get this coal,—a feeling which was evidenced by Mr. Sturges' remark to Dr. Rice, "I asked him if he wasn't a little gally in using my ammunition to shoot my ducks." That some one else would slip in and bid a considerable advance over them seemed never to have occurred to their minds. When informed she had signed the option, Mr. Sturges says, "Of course, I was utterly dumbfounded; I never had thought of such a thing." But that there was any misrepresentation on Judge Jessup's part, or that he told Mr. Sturges that 40 cents was Mrs. Hackley's price, Mr. Sturges himself does not say. He testifies:

"And I want to say right here,—I don't want to be misunderstood,—Judge Jessup did not say her price would be forty cents per ton, but that she had made a lease to Jones and Williams at forty cents, and he presumed she would want the same for this land. He did not say that forty cents would be her price, but I understood that was her figure, and that, if we offered that, we would get it."

Feeling sure, as we have noted, from their abutting against the property, that the coal would naturally drop to them, it is not surprising that Mr. Sturges and his company should receive the impression they did; but the fact remains that such an impression was a mistake on their part, and was not caused by Judge Jessup.

An agreement to lease, fair and reasonable in terms, certain in its subject, and procured without fraud or mistake, being shown, will equity afford relief in the way of specific performance? We think, in this particular case, it should, because otherwise the complainant would be without an adequate remedy at law. The general doctrine is that in contracts for the sale and purchase of lands, as a class, damages are inadequate. Pom. Spec. Perf. Cont. p. 38. In discussing the question as to where equity will give relief, it is laid down by the same author (page 9) that where the legal remedy is impracticable, where from special, practical features of a contract, inherent in its subject-matter or its terms, it is impossible to arrive at a legal measure of damages with any sufficient degree of certainty, so that no real compensation can be obtained in an action at law, then equity will specifically enforce the contract. By this means alone can the injured party have the substantial effect of his agreement. "To this head," the author says (page 46), "must be referred a variety of different agreements,—among others, contracts in which acts are to be done or articles delivered by one party, and payments are to be made by the other, in installments, at stated times, through a number of years, and where, to compel the plaintiff to accept a present sum, by way of

damages, for a nonperformance, would be forcing him to sell his expected profits for a price wholly conjectural." In summing up his conclusions from an examination of the cases, the author states, and his reasoning to our mind is sound, as follows:

"The foregoing instances are sufficient to illustrate and establish the doctrine that equity may interpose, and specifically enforce a large variety of agreements, where the measure of legal damages is purely conjectural, and the legal remedy of compensation is, therefore, wholly impracticable. These cases have also been, and generally are, cited to show that equity has jurisdiction where damages are inadequate; but the inadequacy here consists in the impossibility of arriving at any definite amount of damages, by means of the certain and fixed rules which govern the common-law methods of administering justice."

Applying this principle to the case in hand, we think it pre-eminently one where the remedy at law would be comparatively inadequate, when contrasted with the adequacy of the equitable remedy of specific performance. The lease must necessarily extend through a number of years, the amount of coal mined each year is uncertain, and the royalty payable depends, owing to the sliding scale, running from 42 to 50 cents, on the year in which it is mined. In addition to this, the faults in the coal, and the extent of such faults, all of which are problematical, and now necessarily uncertain, render the value of the lease uncertain. The foregoing facts show the wide possible variation in the values set upon this coal, and the conjectural value of the lease as a working interest. In the matter of royalties alone, to say nothing of the possible financial results of working the coal, we have seen a net difference of $27,000 in estimated value; and these show the wide range of possibilities and probabilities to which a jury could alone resort in estimating the value of the undeveloped lease. It is, therefore, clear to us that, in the uncertainty surrounding the subject-matter, and the necessarily conjectural character of the evidence that alone could

be submitted, the fixation of any amount by a jury would be conjectural in character. By decreeing specific performance, we have the assurance that the agreement which the parties made would be carried out; while, in remitting the parties to an action at law for damages, from the problematical character of the testimony to be submitted to the jury, we could have no assurance that substantial justice between the parties was reached. "When a contract concerning real estate is valid, unobjectionable in its nature and in the circumstances connected with it, and capable of being enforced, and it is just and proper that it should be fulfilled, it is as much a matter of course for a court of equity to decree a specific performance as for a court of law to give damages for the breach of it." Wat. Spec. Perf. Cont. p. 7. § 6.

We are therefore of opinion, after careful consideration, that the case is one for a decree of specific performance.

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notice, actual or constructive, of the superior right of another, he cannot be allowed them. *Id.*

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APEX.

1. *Original end lines not parallel.*—Where the description in the patent shows the claim to have parallel end lines, the fact that the original location did not have such parallel end lines will not affect the right to follow the vein on the dip, which belongs to all lode claims having parallel end lines. *Waterloo Co.* v. *Doe,* 2

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CONVEYANCE. *Continued.*

and the property conveyed reverts to the grantor upon abandonment of work. *Paine* v. *Griffiths*, 297

2. *Stockholders' consent to corporate deed.*—The fact that the consent of the holders of two-thirds of the stock of a corporation was not obtained to the execution of a deed by the corporation, as required by Mont. Civ. Code, Secs. 1012, 1013, does not render the deed void, and it cannot be attacked on that ground by a stranger to the title. *Boston Co.* v. *Montana Co.*, 480

See APEX, 11; ESCROW; TRUST.

CORPORATIONS—See CONVEYANCE.

COVENANT—See RENTS AND ROYALTIES, 5.

CUSTOM.

1. *A special custom of smelters* cannot control an express contract clear and free from ambiguity on the point supposed to be covered by the custom. *Silver Co.* v. *N. C. Sm. Co.*, 339

DESCRIPTION—See LOCATION CERTIFICATE.

DISCOVERY.

1. *Sufficient discovery of lode.*—Seams containing mineral-bearing earth and rock, discovered on a claim before its location, were similar to seams that had induced other miners to locate claims in the same district, and which by development had proved to be a part of a well-defined lode or vein containing ore of great value. *Held*, a sufficient compliance with Rev. St. § 2320, requiring the discovery of a lode or vein within the limits of a claim before a valid location thereof can be made. *Shoshone Co.* v. *Rutter*, 356

2. *Need not be first discoverer.*—Under section 2320, Rev. St. U. S., the locator of a mining claim is not required to be the original discoverer of the vein or lode. If, at the time of making the location, there is the discovery of a vein or lode of quartz or other rock in place, and knowledge on the part of the locator of mineral there, the locator is entitled to make his location, even though the discovery was first made by some one other than the locator. *Hayes* v. *Lavagnino*, 485

See ESTOPPEL, 4; LOCATION.

DISCOVERY SHAFT.

1. *New discovery shaft after loss of original.*—The Star lode was discovered and location begun; then the Gopher claim was

DISCOVERY SHAFT. *Continued.*

laid over it and allowed to go to patent. After this the owner of the Star made a new discovery on ground clear of the patent, restaked the claim and moved the notice to the new discovery, but made no new record; no third parties intervened. *Held*, that the Star was a valid claim dating from the sinking of the new discovery. *Perigo* v. *Erwin*, 269

2. *The requirement of a discovery shaft* or cut within 90 days after posting notice is not in derogation of the mining act which does not require annual labor during the location year. *Sisson* v. *Sommers*, 644

See LOCATION.

DISTRICT RULES.

1. *Continued compliance with local rules required.*—To enable a party to maintain a right to a mining claim after it has been acquired, he must continue to comply substantially with the laws of Congress and of the state, and the local regulations of miners in force in the district where the claim is located. *Sisson* v. *Sommers*, 644

DITCH.

1. *Where there are two claimants neither of whom complies* with the statute the one who first completes the appropriation, not the one who first began his ditch, has the prior right. *Murray* v. *Tingley*, 137

2. *Non-user.*—A ditch constructed for mining purposes on unoccupied public lands of the United States is held by grant, and the owner of such ditch does not forfeit his right thereto merely by non-user. *Welch* v. *Garrett*, 193

3. *Idem.*—Non-user of a ditch, brought about by circumstances over which the ditch owner has no control, is not evidence of abandonment of, or intention to abandon, such ditch. *Id.*

See RELATION.

DUMP.

1. *Refuse left by lessee acquiring subsequent value—Dumps not mineral deposits.*—A lessee working an iron mine accumulated on the surface and left at the end of his lease immense mounds of tap-cinder, the refuse after treating the iron ore on the premises. These dumps were at the time wholly unsalable, but afterwards acquired a commercial value. After the surrender of the iron lease the premises were demised and worked for the remaining ironstone and the underlying coal. Such lessees, the defendants,

DUMP. *Continued.*

began to sell and remove the contents of the mounds. *Held*, 1. that the mounds were realty.

2. That the tenants, lessees of the coal and iron, had no right to work these mounds.

3. That the demise of all mines, seams, beds, etc., did not apply to an artificial deposit on the surface. ***Boileau* v. *Heath*,** 349

EJECTMENT—See EVIDENCE, 1; POSSESSION, 1.

EMINENT DOMAIN.

1. *Tunnel condemned by tunnel site.*—Under the Nevada statute of March 1, 1875 (Gen. St. §§ 256-273), authorizing the condemnation of rights of way for mining tunnels, a mining company may condemn, for use in reaching its mine, an old and partially ruined tunnel in a neighboring claim, which is not used by the owners of that claim at the time, there being nothing to show any present purpose to use it. *Byrnes* v. *Douglass*, 96

2. *Condemnation without payment of damages.*—The report of commissioners in condemnation proceedings under the Nevada statute, finding on conflicting evidence that no damage will be done by the construction of a tunnel through certain claims, and that such claims would rather be benefited thereby, will not be disturbed on appeal. *Id.*

3. *Measure of damages for pipe line.*—In a proceeding, under the act of February 20, 1889, for the appropriation of an easement in lands for the purpose of laying natural gas mains, the measure of damages is the actual value of the land appropriated, and any injury to the residue. *Manufacturers Co.* v. *Leslie*, 566

4. *Possible injury to future crops.*—Where an easement in land is appropriated for the laying of natural gas mains, damages cannot be allowed for possible injury to crops from leakage or for injuries to persons and property likely to result from explosions. *Id.*

5. *Idem.*—In the absence of evidence that a natural gas main will prevent the future improvement of land, damages cannot be allowed therefor in proceedings to appropriate an easement for its construction. *Id.*

END LINES.

1. *Coincidence of lines.*—A relocation of a claim which conflicts with another claim, so as to exclude the part in conflict, though accompanied by an express statement that the line of the other claim becomes an end line of the new location, is not a concession or agreement that such line is an end line of the other claim.

END LINES. *Continued.*

Coincidence of lines between claims does not make them either side lines or end lines. *Walrath* v. *Champion Co.*, 410

2. *End lines must be straight.*—It is the end lines alone, which define the extralateral rights, and they must be straight lines, not broken or curved lines, and to such the right on the vein below is strictly confined. *Id.*

See APEX.

EQUITY.

1. *Equity jurisdiction to preserve property.*—When complainant seeks to enjoin a continuous and destructive trespass equity has jurisdiction to preserve the property till the title is settled at law. *Waterloo Co.* v. *Doe*, 1

2. *Waiver of right to jury trial.*—But if the defendant sets up a hostile title and allows the issue of title to be decided by the court as a court of chancery, it is too late in the appellate court to raise the objection that there was no jurisdiction below. *Id.*

See ADVERSE CLAIM, 1, 8; PARTIES.

ESCROW.

1. *No notice.*—A contract not brought to the notice of those holding stock in escrow until after they have delivered it in pursuance of the terms of the contract under which they hold will not be valid, even though the contract might have been valid if brought to their notice before delivery. *Walker* v. *Bamberger*, 470

2. *Escrow holder may force interpleader.*—Where persons hold stock in escrow, to be delivered in accordance with the terms of an option, and no collusion appears, they may require the parties interested to interplead and litigate the conflicting claims between themselves. *Id.*

ESTOPPEL.

1. *Principles of estoppel* in pais discussed. *Williamson* v. *Jones*, 20

2. *Silence no estoppel.*—If one claiming sole right to another's land spends money in improving or operating upon it, though ignorant of that other's right, the mere silence of that other will not estop him from asserting his title. He need not seek the other to tell him of his right, or speak at all, unless placed in such a situation as calls upon him to declare his right. *Id.*

3. *Estoppel against lessee.*—The taking possession of the lessor's property by the lessee company, under an oil lease, and drilling a well from which gas was obtained and paid for, and afterwards

ESTOPPEL. *Continued.*

executing a written agreement referring to the leasehold created by the lease as its property, estops the lessee from denying its execution of the lease. *Ahrns* v. *Chartiers Co.*, 585

4. *Grantor estopped to deny discovery.*—Persons who locate a lode claim, and record their location certificate, are estopped as against one to whom they sell an interest in the claim after an examination of the records, to assert that there was no discovery to support the location. *McCarthy* v. *Speed*, 615

See LEASE, 13, 14; RENTS AND ROYALTIES, 1, 2.

EVIDENCE.

1. *Cancelled receiver's receipt as evidence of good faith.*—In ejectment to recover a mill-site location connected with a mining claim, to which no patent has issued, where complainant relies upon his own prior possession and an ouster by defendant, a canceled receiver's receipt is admissible in evidence, not as showing title, but as tending to show, in connection with other evidence, the good faith of the plaintiff, pursuant to its location and survey. *Valcalda* v. *S. P. Mines*, 233

2. *Statutory directions do not exclude technical explanations.* Under Civ. Code, § 2209, 2210, providing that the words of a contract are to be understood in their ordinary and popular sense, and that technical words are to be interpreted as usually understood by persons in the business to which they relate, the court may admit evidence of qualified witnesses to interpret the technical terms used in a mining lease according to the usual understanding of miners. *Cambers* v. *Lowry*, 539

3. *Proof of existence of coal by development on adjoining land.*—Facts recited and held sufficient proof of the existence of coal under the demised ground. *Colo. Fuel Co.* v. *Pryor*, 544

4. *Conversations—Defendant not present.*—In an action to compel defendant to convey an interest in a mining claim, claimed to be located and held in trust for a partnership, conversations between two of the members thereof in defendant's absence, relative to its location, are inadmissible. *Reagan* v. *McKibben*, 557

5. *In such action, evidence that a third person was defendant's agent* is properly excluded, where the declarations made by him to bind defendant, as agreeing to convey the same, were not in writing, nor authorized by defendant in writing. *Id.*

6. *Courts will take judicial notice of the meaning of ordinary mining terms* such as shaft, tunnel, level, chute, stope, uprise, cross-cut, incline, etc. *Hines* v. *Miller*, 609

See ADMISSIONS; ALIENS, 2; COMPROMISE; CUSTOM; FRAUD, 4; LEVEL; LODE, 1-3; RELOCATION, 4, 5; TITLE BOND, 2, 3.

EXHAUSTED MINE.

1. *Facts of the case—Merchantable iron ore.*—The plaintiff executed to defendant a lease for a term of years of certain lands for the purpose of exploring for, mining, taking out, and removing the merchantable shipping ore which is or may hereafter be found on, in, or under said lands, the defendant to pay the plaintiff a stipulated sum per ton for all the iron ore mined and removed from the lands during the term of the lease. The lease also contained a covenant by the lessee that he would mine and remove from the lands at least a specified number of tons of ore each year, and that, if he should fail to mine that amount in any one year, he would pay to the plaintiff an amount which, when added to any amount previously paid as royalty for ore mined during that year, should equal the royalty on the minimum quantity of ore which he was required to mine that year; provided, however, that he might mine and remove in any subsequent year, without other payment therefor, a sufficient quantity of ore to offset the amount so paid in excess of the quantity actually mined during such preceding year. The lease further provided that the lessee might terminate the lease at any time on 60 days' notice to the lessor. By diligent and sufficient search and exploration on part of the lessee, it was demonstrated that there was no merchantable shipping iron ore on the land. In an action by the lessor to recover the minimum royalty, *Held*, that "merchantable shipping iron ore" was the subject-matter of the lease, and not mere matter of inducement to its execution. *Diamond Co.* v. *Buckeye Co.*, 197

2. *No ore no royalty.*—Also that the covenant to mine a specified quantity of ore each year, or upon failure to do so, to pay the royalty upon that amount imposed an obligation to pay for the stipulated quantity of ore, whether mined or not; not whether it existed or not. In other words, it was not a covenant to pay royalty whether the ore existed or not, but one to pay the royalty if the ore existed, whether mined or not. Hence the nonexistence of the ore was a defense to an action to recover the royalty. *Id.*

3. *Failure to determine lease.*—The fact that the defendant had not exercised its right to terminate the lease did not prevent it from availing itself of the defense that the royalty had not accrued due. *Id.*

See SEVERANCE, 1.

FAULT—See SPECIFIC PERFORMANCE, 2.

FORFEITURE.

1. *Forfeiture is not complete till a second party has acted* on the default of a first party; and the co-owners of a possessory mining claim are in such privity of title that they cannot assert forfeiture against each other except by the statutory proceeding allowed when co-tenants fail to contribute to the annual labor. *McCarthy* v. *Speed*, 615

2. *Failure to comply works forfeiture.*—A failure to comply with the laws and regulations in force in the district, whether national, state or local, works a forfeiture of the claim, whether such laws or regulations so provide or not, and the same becomes subject to location by any qualified locator. *Sisson* v. *Sommers*, 644

See ASSIGNMENT; DITCH, 2; OIL, 9.

FRAUD.

1. *Fraud of married woman.*—A married woman cannot, by even fraudulent conduct, be barred under the principle of estoppel in pais from asserting her title to land, though separate estate; but as to her personal estate it is different. Now that she is enabled to contract as if single, she will be bound by estoppel in pais touching her contracts as if single. *Williamson* v. *Jones*, 20

2. *Fraud of infant.*—An infant of years of discretion, by intentional fraudulent conduct, will be barred, under the doctrine of estoppel in pais, from asserting her title to either real or personal property against one misled thereby. *Id.*

3. *Agent purporting to act for one, really acting for the other party.*—No sale from which a substantial advantage has been derived can be sustained when he who actively promoted it acted as the ostensible agent for the vendor, when in reality he was the secret agent of the purchaser. *Donovan* v. *Campion*, 247

4. *A plaintiff may recover upon proof of constructive* fraud without proving the actual fraud charged. *Kelly* v. *Clark*, 431

See ESTOPPEL, 2; LEASE, 11; STOCK.

INFANT—See FRAUD, 2.

INJUNCTION—See OIL, 1; TENANT FOR LIFE, 2.

INJUNCTION BOND.

1. *Judgment against sureties on dismissal.*—A court of equity on the dissolution of an injunction, may under its general powers, and in the absence of statutory provisions, have the damages occasioned by its issuance assessed under its own direction, and

INJUNCTION BOND. *Continued.*

may render judgment therefor against the sureties as an incident to the principal suit. *Tyler Co.* v. *Last Chance Co.*, 525

2. *Release of sureties by modification of injunction.*—Under the rule that the liability of a surety cannot be extended by implication beyond the express terms of his contract, sureties on a bond given to procure a restraining order, which order required the defendants to cease working a certain portion of a mine, and to refrain from removing or appropriating ore previously taken therefrom, cannot be held liable for damages accruing to defendants after a subsequent order, which continued such restraining order in force, but modified and changed it by permitting the working of the mine, and the disposition of the ore taken therefrom, under regulations prescribed by the court. *Id.*

3. *Cost of pumping as damages.*—In a suit to enjoin defendant from the further working of a mine beyond the alleged limits of its claim, in which a temporary injunction was allowed, and by a subsequent order the court required the defendant to pump the water from its workings to permit an inspection by complainant's engineers, the complainant is liable on its bond, on a final determination of the suit in favor of defendant, for the cost of such pumping, though continued much longer than was necessary for the making of the inspection, where such continuance was solely by reason of the order and the complainant itself delayed its examination, and took no steps to have the work stopped. *Id.*

INSTROKE.

1. *Right of coal owner to carry other coal through his gangways.*—The surface and mining estates being severed, one owning the coal and another the surface, the owner of the coal has the right to use the gangways through his stratum of coal for the transportation of coal from other mines. *Webber* v. *Vogel*, 639

INTERPLEADER—See ESCROW, 2.

JURISDICTION.

1. *Federal case on state statute.*—Where the requisite diverse citizenship exists, a suit may be brought on the chancery side of the federal court in a given state by a person in actual possession of real estate therein to quiet his title as against an adverse claimant, predicating the suit upon the state statute extending to such cases the jurisdiction of the state courts. *Gillis* v. *Downey*, 253

KNOWN LODE—See TOWN SITE.

LAND OFFICE.

1. *Temporary mistake of surveyor.*—One who has located a claim, filed his notice and procured a survey thereof by the United States deputy surveyor as required by law, cannot be deprived of his property because the surveyor failed by mistake to include all that was covered by his location notice, where the mistake was cured by a resurvey, under the orders of the Interior Department, within a few days after the owner discovered it. *Basin Co.* v. *White*, 690

2. *The surveyor is an official of the United States government* and acts in that capacity and not as the agent or attorney of the owners of mining claims. *Id.*

See ADVERSE CLAIM, 4.

LEASE.

1. *Lessee compelled to pay right of way through coal bed.* —Defendant's lease called for him to pay $1,000 bonus in case he struck a 100 barrel well. He had been sued by the owner of a coal bed which he pierced in sinking, (the coal bed being a severed estate) and had been compelled to buy his peace. *Held*, that this was no defense to a suit for the bonus as the lessor had done no act in breach of any implied covenant for quiet enjoyment. *Chambers* v. *Smith*, 146

2. *Facts of the case.*—The affidavit of defense set up that prior to the lease, lessor had conveyed the underlying coal, reserving the right to drill three wells through it; he had also conveyed certain portions of the surface of his land to various persons without reserving to himself any right to drill upon them. After defendant struck the oil he was sued by the coal-owners and forced to an expensive compromise. *Held*, that the affidavit was no defense. *Id.*

3. *"Null and void" clause not self-acting.*—An oil and gas lease for a term of years provided that, if the lessee failed to complete one well within one month, he should thereafter pay a fixed rental till a well was completed; and that failure to complete such well or pay said rental should annul the lease, the lessee "having the option to drill said well or not, or pay said rental or not, as he may elect." *Held*, that the lessee must drill the well or pay the rent, and could not relieve himself from liability by refusing to do either. *Jackson* v. *O'Hara*, 153

4. *Assignee held for rent.*—A written assignment of an undivided one-half of the lessee's interest in an oil and gas lease makes

LEASE. *Continued.*

the assignee a joint owner of the lease, and jointly liable thereunder with the original lessee. *Id.*

5. *Lessee may delay till last day.*—A lessee of land for oil and gas purposes, required by his lease to commence operations on the premises within 30 days, on penalty of the lease being void, does not forfeit his rights if on the last day of the period allowed he in good faith enters and commences operations on the premises preparatory to drilling a well, and is prevented by the lessor from proceeding therewith. *Henderson* v. *Ferrell*, 205

6. *"Non-assessable" interest.*—"In the phraseology of miners a non-assessable interest in a lease upon a mining claim is an interest against which no expense is chargeable." *Maloney* v. *Love*, 310

7. *The royalty reserved makes a good consideration* for a lease and it will be held valid notwithstanding it covenant to give monopoly trade to a supply store, if such covenant be treated as void for reasons of public policy. *Colo. Fuel Co.* v. *Pryor*, 544

8. *One taking a lease of a half interest* from one of the co-owners cannot plead that the lease was void for want of the consent of the other co-owner, such co-owner having made no objection. *Id.*

9. *Lessees not bound to work at a loss.*—In the absence of express covenants the implied covenant to keep at work does not apply where the coal could not have been extracted to a profit. And to recover substantial damages, to-wit; the royalty on the coal which the lessees could have mined, the lessor must prove that it was workable to a profit. *Id.*

10. *Owner letting direct to sublessees.*—Plaintiffs leased oil and gas land from the owner in consideration of a quarterly rental, and a portion of the oil or gas which might be discovered. They sublet a portion of the premises to an oil company, subject to the conditions of the original lease, which the sublessees assumed. Plaintiffs continued to pay the rent until that falling due on May 13, 1888, which was not paid. On June 19, 1888, the owner executed a new lease directly to the sublessees, providing that they should stand between him and "all who may have claims to this lease." *Held*, that the latter lease did not work a forfeiture of plaintiffs' lease from the owner. *Stone* v. *Marshall Co.*, 593

11. *Such overletting held fraud.*—Plaintiffs leased oil and gas land from the owner, and afterward sublet a portion of it to an oil company, which agreed to drill two wells, and pay plaintiffs one-fourth of the profits from them. After completing one well, the sublessees procured a lease direct from the owner, which did

LEASE. *Continued.*

not require two wells, or payment of the royalties. *Held*, that the second lease was a fraud on plaintiffs. *Id.*

12. *Sale of gas amounts to sublease.*—A sale, by the lessees of a gas well, of the gas flowing from it, to a gas company, which took charge of the well and conducted the gas off the premises, is really a sublease of the well itself. *Id.*

13. *Silent acquiescence in disuse no bar to recovery of rental.*—An oil and gas lease for a term of twenty years stipulated that the lessee should drill at least two wells on the premises; it also provided that a failure by the lessee to pay the rental specified at the times stated should render the lease null and void. The lessee drilled one well, but never drilled the second one. The gas from the first well was utilized and paid for more than two years, when the well was plugged, the casing pulled and the rig taken down. The lessee did not surrender or offer to surrender the written lease or place upon record any paper showing that the recorded lease had been surrendered. Ten years after the last payment of rental the lessor brought an action of assumpsit for rentals under the lease. *Held*, (1) that the lessee had no right to abandon the leasehold even if the first well had proved a total failure, as it had expressly contracted to test the farm by drilling two wells; (2) that there was no evidence in the case that the lessor knew or ought to have known that the lessee ever intended to abandon and surrender its rights under the lease. *Ahrns* v. *Chartiers Co.*, 584

14. *Failure to deny execution of lease.*—A defendant is estopped from asserting, in the common pleas, that the lease sued on was not duly executed, where a copy of the lease is filed on or before the return day of the writ, unless the execution is denied by affidavit filed with or before the plea entered by defendant, as provided by section 5 of rule 3 of the court of common pleas. *Id.*

15. *A purchase of the reversion in fee by a tenant for years* ends the tenancy, and the tenant is not thereafter estopped from denying further continuing title or rent in the landlord. *Wade* v. *S. Penn. Co.*, 605

16. *Indefinite term—Right in either landlord or tenant to determine at end of any year.*—An oil lease provided that it should be deemed to have terminated "whenever natural gas ceased to be used generally for manufacturing purposes in Howard county, Indiana, or whenever the second party, their heirs or assigns, shall fail to pay or tender the rental price herein agreed upon, within sixty days of the date of its becoming due, and in the event of the termination hereof for any cause, all rights and lia-

LEASE. *Continued.*

bilities hereunder shall cease and terminate." Defendants never took possession of the premises. *Held*, that the agreement ran only from year to year, and that at the end of any year either party could terminate the agreement, the one by refusing to accept, and the other by refusing to pay the stipulated sum. *Diamond Co.* v. *Curless*, 682

See ASSIGNMENT; COAL; DUMP; ESTOPPEL, 3; EXHAUSTED MINE; LIEN, 1-4; MERGER; OIL; RENTS AND ROYALTIES.

LEVEL.

1. *Meaning of level.*—A mining lease provided that there should be no ores stoped, except at the 300-foot level. Testimony of those familiar with technical mining terms showed that everything below the 200-foot level and above the 300-foot level is called the "300-foot level." *Held*, that stoping ore from the bottom of a 60-foot winze sunk from the 200-foot level was not a violation of the lease. *Cambers* v. *Lowry*, 539

LIEN.

1. *Lien of co-lessee advancing funds.*—Where the lessees of a mine which the lease provided should be worked continuously, or the lease be forfeited, assigned an undivided interest in the lease to O., on condition that he comply with the terms of the lease, and afterwards assigned their remaining undivided interest to B.—O., doing all the work on the premises, is entitled to a lien on the interest of B. for his share of the work and expenditures necessary to preserve the lease. *Beck* v. *O'Connor*, 342

2. *Where the miners are employed by one in charge of the work as agent of the owners* in the working of the claim, the rule of notice to or knowledge by the owners of the performance of labor in improvements made by persons other than the owners, provided for by Section 1192 of the Code of Civil Procedure, has no application. *Hines* v. *Miller*, 609

3. *Miners employed to do development work* are entitled to a lien as fully as those actually extracting ore. *Id.*

4. *The lessor has notice and his estate is bound* where the lease expressly calls for the work done and the lessor does not give the statutory notice. *Id.*

LOCATION.

1. *A lessee cannot make a valid location* of the demised ground. *Justice Co.* v. *Barclay*, 68

2. *Before discovery of a vein* on the public domain there can be no valid lode location. *Perigo* v. *Erwin*, 269

LOCATION. *Continued.*

3. *The order of the doing* of the several acts which perfect a location is not material where the rights of third parties do not meantime intervene. *Id.*

4. *Setting corner stakes on patented ground* does not invalidate the claim. *Id.*

5. *Overlapping locations* are of constant occurrence, recognized by land office practice and impossible to be avoided under the mineral land laws. On such state of facts the nominal trespass of placing stakes on older claims will not be held to vitiate the claim notwithstanding the rights of the older locator to the exclusive possession of his surface ground. *Del Monte Co.* v. *Last Chance Co.*, 370

6. *Setting stakes on and protracting lines across prior claim.* —Lines of a junior lode location may be laid within, upon, or across the surface of a valid senior location for the purpose of defining for or securing to, such junior location underground extralateral rights not in conflict with any rights of the senior location. *Id.*

7. *Location not perfected.*—(a) As against a subsequent locator, a location not perfected according to the territorial laws within the time provided, becomes forfeited and void, and the ground embraced therein becomes open to location. (b) Plaintiff, to maintain ejectment against a subsequent locator, must show a valid location. (c) When the facts produced by plaintiff show a forfeiture of his location has taken place, it is the duty of the court to instruct the jury to find for the defendants. *Lockhart* v. *Wills*, 497

8. *Conspiracy, when immaterial.*—Where facts show that a forfeiture of plaintiff's location has taken place for failure to perform the statutory requirements for a valid location, it is immaterial to show that such failure was a result of a conspiracy to defraud plaintiff on the part of plaintiff's co-locator, with other persons who locate after forfeiture. *Id.*

9. *Intervention of hostile location.*—(a) When plaintiff allows his location to become forfeited by failure to perfect same, as required by law, he cannot set up as an excuse for failure that prior to the expiration of the time allowed by law to perfect his location others took adverse possession of his claim, of which he was not aware until after forfeiture.

(b) In order for adverse possession and ouster to furnish an excuse for not perfecting the location of a mining claim, the party offering such excuse must have in some way been prevented thereby from perfecting his location. *Id.*

LOCATION. *Continued.*

10. *The state cannot dispense with any mandatory requirement* of the act of Congress, but it may add reasonable additional conditions. *Sisson* v. *Sommers*, 644

11. *First perfected location holds.*—Where the required shaft was not sunk within the 90 days and a second party entered and perfected his location, such second location holds the ground. *Id.*

12. *Right to swing claim.*—The discoverers of the Never Sweat posted their notice claiming 500 feet southerly and 1,000 feet northerly. During the 90 days allowed to perfect location other parties discovered the Yukon. They had read the Never Sweat notice and purposely kept clear of its ground. Before the 90 days had expired the Never Sweat locators returned and placed their stakes and made their record so as to take in a large part of the Yukon claim. *Held*, that they had the right to swing their claim as they pleased within the 90 days and were not estopped by their notice. *Sanders* v. *Noble*, 650

See ALIENS, 3; DISCOVERY; LODE; PATENT, 2; PLACERS; POSSESSION, 3; PUBLIC DOMAIN; QUIET TITLE; TENANTS IN COMMON; WATER, 1.

LOCATION CERTIFICATE.

1. *Failure of last call in description to close.*—A location notice of a mining claim is admissible in evidence, though the direction of the closing location line is indefinitely described, the location being sufficient in all other respects, and the proof showing that all the monuments were on the ground. *Providence Co.* v. *Burke*, 625

LODE.

1. *Narrow veins in broad zone.*—Where two veins or ore bodies, lying near together in country rock of liparite, each had clearly-defined foot and hanging walls, with the usual characteristics of lodes or veins. *Held*, on the evidence that they were separate lodes or veins, and could not be considered as constituting, with the mass of liparite between them, a single mineralized zone or lode, though the intervening liparite was more broken up than that lying outside, and to some extent impregnated with silver. *Waterloo Co.* v. *Doe*, 2

2. *Range of evidence in disputed lode continuity.*—On a question of the identity or continuity of lodes; of whether there is but one lode or several lodes, a wide latitude of evidence is allowed and a divergence of opinion is to be expected. *Justice Co.* v. *Barclay*, 68

LODE. *Continued.*

3. *Proof of the vein and its discovery.*—In a suit to determine the right of possession of a mining claim, it is incumbent upon the locator to show, not only a location upon ground in due form of law, but also to show that the location was made upon a vein or lode of quartz or other rock in place, bearing mineral, with the discovery or knowledge on the part of the locator, before the location was made, of the existence of mineral there. *Hayes* v. *Lavagnino*, 485

4. *Vein in zone.*—In practical mining, the terms "vein" and "lode" apply to all deposits of mineralized matter within any zone or belt of mineralized rock separated from the neighboring rock by well-defined boundaries, and the discoverer of such a deposit may locate it as a vein or lode. In this sense these terms were employed in the several acts of Congress relating to mining locations. *Id.*

5. *Any valuable deposit.*—Under the acts of Congress of July 26, 1866, and May 10, 1872, any deposit of mineral matter, or indication of a vein or lode, found in a mineralized zone or belt, within defined boundaries, which a person is willing to spend his time and money to follow, in expectation of finding ore, is the subject of a valid location; and, when metallic vein matter appears at the surface, a valid location of a ledge deep in the ground, to which such vein matter leads, may be made. *Id.*

6. *Location of lode within placer.*—The owner of an unpatented placer claim, or another with his consent, can locate a lode claim within the boundaries of the placer claim. *McCarthy* v. *Speed*, 615

7. *Location of lode within placer.*—A placer location and patent confers neither title nor right of possession to lodes and veins known to exist within its limits at the time patent is applied for, and a subsequent locator of such lode or vein is not a trespasser upon the rights of the placer locator. *Mt. Rosa Co.* v. *Palmer*, 696

See APEX; DISCOVERY; LOCATION; PLACERS.

MARRIED WOMEN—See FRAUD, 1.

MEASURE OF DAMAGES—See EMINENT DOMAIN, 2-5; INJUNCTION BOND, 3.

MECHANICS LIEN—See LIEN, 2-4.

MERGER.

1. *Merger of lease in lease.*—If a lessee for life or years take a new lease of the reversioner for a longer or shorter term than before, it is a surrender of the first lease. *Wade* v. *S. Penn. Co.*, 605

MERGER. *Continued.*

2. *Lease and option.*—A lease yielding rent and an option to purchase the fee outright are not inconsistent, and the taking such lease during the term of the option will not abrogate or surrender it. *Id.*

3. *Purchase merges the lease.*—Where there is a lease for years with rent, and an option to purchase the fee, an election to purchase under the option, and tender of the purchase price under it, ends the lease and its rent. *Id.*

See LEASE, 15.

MEXICAN GRANT.

1. *Certain Spanish grants open to prospectors.*—Lands embraced within the boundaries of a Mexican or Spanish grant in New Mexico in 1893, as claimed, and which were sub judice in the court of private land claims, were open to exploration and purchase under the mining laws of the United States. *Lockhart* v. *Wills*, 497

See APEX, 6.

MILL-SITE.

1. *Sufficient acts of possession to hold mill-site.*—It is a sufficient possession of a mill-site claim to maintain ejectment therefor that its corners are marked with painted posts, as is the custom in locating such mill-sites, and that the claimant had a house and stable thereon, and had constructed tunnels to increase the flow of springs, and built a wagon road to his mines, thus indicating a present and continuous use. *Valcalda* v. *S. P. Mines*, 233

MINING CLAIM—See PUBLIC DOMAIN; QUIET TITLE, 1, 2.

MISTAKE.

1. *Fraction omitted by changing lines.*—The U. S. deputy mineral surveyor employed by plaintiff to survey for patent, upon misinformation as to adjoining boundaries so changed the lines as to omit a certain fraction. This fraction was immediately located by defendant. In a few days the mistake was discovered and a resurvey promptly procured. *Held*, that the fraction was not lost to plaintiff. *Basin Co.* v. *White*, 690

See LAND OFFICE, 1.

NATURAL GAS—See LEASE, 12; RESERVATION, 1.

NEGLIGENCE—See BLASTING.

NEW TRIAL.

1. *Practice, on motion for new trial.*—Under Comp. Laws § 5090, Subd. 4, providing that, when the motion for a new trial is made upon the minutes of the court, the specification of errors relied on must be made in the notice of intention, it is unnecessary that such specification be set out in the bill of exceptions. *Reagan* v. *McKibben*, 556

2. *A notice of intention to move for a new trial, which contains specifications* of errors sufficient to call the attention of the trial court to the particular errors of law relied on, and which presents substantially all the questions discussed, is a sufficient statement thereof. *Id.*

See PRACTICE, 4.

NON ASSESSABLE—See LEASE, 6.

NOTICE.

1. *A purchaser at a judicial sale* is conclusively held as having notice of all facts touching the rights of others in the property sold, disclosed by the record of the case. *Williamson* v. *Jones*, 20

See ASSIGNMENT; ESCROW, 1.

OIL.

1. *Petroleum oil in place is part of the land.*—Its wrongful extraction by one lawfully in possession is waste, and by a stranger is trespass; in both cases irreparable injury, which may be enjoined. *Williamson* v. *Jones*, 19.

2. *Implied covenant to bore additional wells.*—Where lands are granted, demised, and let for the purpose and with the exclusive right of drilling and operating for oil and gas, in consideration that a certain part of the oil produced should be delivered to the lessor, the lease providing that one well should be completed within six months, and in default the lease to be null and void, and the lease being silent as to the drilling of other wells or the protection of lines; *Held*, That in such a lease there is an implied covenant on the part of the lessee that he will drill and operate such number of oil wells on the lands as would be ordinarily required for the production of oil contained in such lands, and afford ordinary protection to the lines. *Harris* v. *Ohio Co.*, 157

3. *No forfeiture for breach of implied covenant.*—Where the forfeiture clause in such a lease is to the effect that a failure on

OIL. *Continued.*

the part of the lessee to comply with the conditions or pay the cash consideration in the lease mentioned, at the time and in the manner agreed, then the lease to be null and void, and not binding on either party, and oil being produced in paying quantities through wells drilled on the lands by the lessee under the lease. *Held*, that the lessee has a vested interest in the lands; that, to work a forfeiture of the lease, there must be a breach of condition or covenant which is mentioned in the lease; that a breach of an implied covenant does not work a forfeiture of the lease; and that certain causes of forfeiture being specified in the lease, others cannot be implied. *Id.*

4. *Remedy in damages.*—Under such a lease, the remedy for a breach of an implied covenant is not by way of forfeiture of the lease, in whole or in part, but by an action for damages caused by such breach. *Id.*

5. *Where a sole devisee is compelled to divide the royalties from oil wells on his land the distributees must compensate him for surface injuries.*—The owner let an oil lease upon 600 acres. He then devised the three farms which made up the 600 acres to his three children severally. The oil wells were upon one only of the three farms.

The Supreme Court held in *Wettengel* v. *Gormley*, 160 Pa. 559, that the royalties were to be divided among the three children. The Court now holds as a corollary to the former case: That the child upon whose land the wells were sunk is entitled to compensation for surface injury or loss of rental value caused by the operation of the wells. The amount of yearly damage fixed by the Court below is upheld but the amount of permanent injury cannot be known before the expiration of the lease and its determination is postponed until after that event. *Wettengel* v. *Gormley*, 213

6. *Oil lease vests no present title.*—A lease for the purpose of operating for oil and gas for the period of five years, and so much longer as oil or gas is found in paying quantities, on no other consideration than prospective oil royalty and gas rental, vests no present title in the lessee except the mere right of exploration; but the title thereto, both as to the period of five years and the time thereafter remains inchoate and contingent on the finding, under the explorations provided for in such lease, oil and gas in paying quantities. *Steelsmith* v. *Gartlan*, 315

7. *The completion of a non-productive well*, though at great expense, vests no title in the lessee. *Id.*

8. *No provision for second well.*—Such lease must be construed as a whole, and, if there is no provision therein contained re-

OIL. *Continued.*

quiring the boring of another well after the first unsuccessful attempt is completed and abandoned, the lease becomes invalid, and of no binding force as to any of its provisions. *Id.*

9. *Must pay rent or surrender.*—A lease for oil and gas contemplates that the lessee have two years in which to bore a well, and provides "that the party of the second part shall pay to the party of the first part $100 per month in advance, until a well is completed, from the date of this lease, and a failure to complete such well, or to pay said rental when due, or within ten days thereafter, shall render this lease null and void, and can only be renewed by mutual consent, and no right of action shall, after such failure, accrue to either party on account of the breach of any covenant herein contained. * * * It is further agreed that the second party shall have the right at any time to surrender this lease to the party of the first part, and thereafter be fully discharged." The lessee bores no well, but holds the lease a number of months, and then surrenders it. *Held*, that the forfeiture provisions are for the lessor's benefit, and he can avail himself of them to declare a forfeiture for non-payment of rental or not, as he chooses, and, if he does not, can recover rental until the surrender of the lease. The lessee's mere failure to pay does not release him from obligation to pay. There was tacit consent to renew. *Roberts* v. *Bettman*, 326

See RESERVATION, 1; WASTE, 1, 2.

OPTION.

1. *Option with or without consideration.*—An offer to sell property, or to transfer a chose in action, with an agreement to keep the offer open until a day named, or for a reasonable time, during which the person to whom it is made may accept, will be binding if a consideration for so doing is given; otherwise it will not. *Walker* v. *Bamberger*, 470

See MERGER, 2, 3; STATUTE OF FRAUDS, 2.

PARTIES.

1. *Reversioners are indispensable parties.*—Owners of vested estates in reversion and remainder, whether by legal or equitable title, are indispensable parties to a chancery suit to sell the fee; and the presence as parties of a tenant for life, or of the trustee holding for them, does not make them parties by representation, and a sale under the decree will not affect or pass their right in the land. *Williamson* v. *Jones*, 20

2. *Remainder-man as party.*—A remainder-man or reversioner

99 48

PARTIES. *Continued.*

has jurisdiction in equity against a tenant for life to enjoin waste, and to have compensation for the damages, the same as if he sued at law, to avoid multiplicity of suits. The same is the case between tenants in common where one is guilty of waste. *Id.*

3. *Classification of parties.*—In the federal courts the possible parties to suits in equity are divided into indispensable parties and proper parties. *Donovan* v. *Campion*, 247

4. *Proper, or indispensable—Distinction between.*—Indispensable parties are those who have such an interest in the controversy that a final decree between the parties before the court cannot be made without affecting their interests, or leaving the controversy in such a situation that its final determination may be inconsistent with equity and good conscience; all other parties are proper parties. *Id.*

5. *Necessary and proper parties—Chancery rule.*—Under the old chancery rule, parties are divided into necessary and proper parties. All those whose presence is necessary to a determination of the entire controversy are necessary parties, and those who have an interest in the subject-matter of the litigation, which may be conveniently settled therein, but whose presence is not necessary to the determination of the controversy at issue, are proper parties. *Id.*

6. *Status of agent as party.*—An agent who was employed to procure the title to real estate, and convey it to his principal, and who has done so, is neither an indispensable nor a necessary party to a bill against his principal to set aside the deed for fraud, and to recover the property and its proceeds. *Id.*

PARTNERSHIP.

1. *An agreement for partnership must have a consideration*; and the mere naked promise of one person that another shall share in the profits of his enterprise, where the other furnishes or does nothing towards the common enterprise, is void. *Trayes* v. *Johns*, 304

See LIEN, 1.

PATENT.

1. *Presumption in favor of patent.*—A patent delivered has the conclusive presumptions in its favor of ownership in the grantee, a proper location, a discovery and the required legal expenditures. *Carson City Co.* v. *N. Star Co.*, 118

2. *Group patent construed as on single location.*—A patent

PATENT. *Continued.*

based upon a number of consolidated locations is to be construed as a patent upon one location. The rule held in the *Kemp Case* that several purchased placer locations become one claim applies to lode claims. The law limiting length to 1,500 feet does not apply to such case. *Id.*

3. *Excessive width.*—A patent upon a group of lode claims treated as one claim with a width of from 650 to 1,250 feet is valid to the full width: the *Lakin Cases* to the contrary held to be distinguishable. *Id.*

4. *The junior patentee cannot follow on its strike* a vein apexing within the area of ground excluded in favor of a prior patent. *Montana Co.* v. *Boston Co.*, 186

5. *Proving chain of title.*—The United States patent and mesne conveyances to plaintiff of a mining lode were admissible in evidence to prove its title thereto, so as to show that plaintiff was entitled, by virtue of such ownership, to the conveyance of the strip of land in controversy, on the ground that in equity it was a part of that lode, although it had been included in the patent to another. *Montana Co.* v. *St. Louis Co.*, 218

6. *Construction of patent containing excluded areas.*—In the case of overlapping locations, a patent for the junior location, which first describes the entire rectangular claim by metes and bounds, and then excepts therefrom the premises previously granted to the senior claim, conveys to the patentee greater rights than would a patent specifically describing only the irregular tract lying outside the senior location. *Del Monte Co.* v. *Last Chance Co.*, 370

7. *Patent under act of 1866.*—A patent issued under the act of July 26, 1866, though expressed as conveying a specified length of a vein, carries only so much thereof as has its apex within the boundaries of the actual location, though this includes less than the length mentioned in the patent. *Walrath* v. *Champion Co.*, 410

8. *Executory contract to patent and convey after patent.*—Neither the statute nor public policy renders invalid a contract made in settlement of litigation over a disputed boundary between mining claims, by which one of the claimants binds himself, on obtaining title from the United States, to convey the portion in dispute to the other. *St. Louis Co.* v. *Montana Co.*, 575

See ADVERSE CLAIM, 6; APEX, 3; TITLE BOND, 1.

PERSONAL PROPERTY—See TENANT FOR LIFE, 1.

PIPE LINE—See EMINENT DOMAIN, 3-5.

PLACERS.

1. *Width of lode claim within placer.*—Section 2333, U. S. Rev. Stats., fixing the width of a lode claim within the boundaries of a placer claim at twenty-five feet on each side of the vein applies not only when the lode is located by the placer claimant, but applies as well to others who locate a lode within the boundaries of a previously located placer. *Mt. Rosa Co.* v. *Palmer*, 696

See LODE, 6, 7.

PLEADING.

1. *Knowledge implied.*—Where the complaint set forth an agreement between the parties, defendant could not evade a positive denial by a denial in the answer of information or knowledge sufficient to form a belief as to the facts set forth. *Raymond* v. *Johnson*, 56

See STATUTE OF LIMITATIONS, 3.

POSSESSION.

1. *No recovery on constructive possession.*—One in possession of public land, not mineral, cannot maintain ejectment against one who has acquired the possession unless the plaintiff show that his own possession was actual, not constructive. *Valcalda* v. *S. P. Mines*, 233

2. *Mere assertions of title* with an occasional act of dominion are ordinarily not sufficient proof of actual possession. *Id.*

3. *Possession without location.*—There can be no right of possession to a mining claim which is not based on a valid location. *Hamilton* v. *Huson*, 274

See ADVERSE CLAIM, 1; MILL-SITE; QUIET TITLE.

PRACTICE.

1. *An amendment on account of the exclusion of a notice*, to aver an actual appropriation of the same water, does not state a new cause of action. *Murray* v. *Tingley*, 137

2. *A voluntary abandonment on the trial by plaintiff of one ground of recovery* eliminates all questions on appeal touching the ground thus abandoned. *Hamilton* v. *Huson*, 274.

3. *Right to remit excess.*—Where, under a lease, there may be recovery of monthly rental for a number of months, but not for all claimed by plaintiff, and he recovers a verdict for more than he is entitled to, he may release the amount beyond the proper number of months, and defendant cannot complain of it. *Roberts* v. *Bettman*, 326

PRACTICE. *Continued.*

4. *New trial on single issue.*—Where, in the trial of an action in which several issues have been submitted and responded to, an erroneous instruction was given upon one issue entirely distinct and separable from the other issues and matters involved in the case, and a new trial can be had upon such issue alone without danger of complication, the new trial will be confined to such issue. *Silver Co.* v. *N. C. Sm. Co.*, 339

5. *A failure to specify errors* or to set out the instructions complained of will justify the dismissal of an appeal. *Beck* v. *O'Connor*, 342

6. *Question too general.*—The supreme court will not answer a question put in such form as to require a decision of the whole case. *Del Monte Co.* v. *Last Chance Co.*, 371

7. (a) *The assigning of a wrong reason* for an act by the trial court is not reversible error if the act done was, in law, right.

(b) When the plaintiff's case is inherently and fatally defective, and is incurable, the defendant is entitled to have the judgment affirmed notwithstanding error of the trial court. *Lockhart* v. *Wills*, 497

8. *Interrogatories not objected to.*—Appellant, who at the trial did not object to the submission of special interrogatories to the jury, cannot on appeal complain that such interrogatories were not authorized by statute. *Manufacturers Co.* v. *Leslie*, 566

9. *A verdict and findings are presumed to be sustained* by the evidence where it is not preserved in the bill of exceptions. *Mt. Rosa Co.* v. *Palmer*, 696

See ADVERSE CLAIM, 9; AMENDMENT; APPEAL; INJUNCTION BOND, 1; NEW TRIAL; PARTIES; PLEADING; RECEIVER.

PRINCIPAL AND SURETY—See INJUNCTION BOND, 1, 2.

PROSPECTING CONTRACT.

1. *Statute of frauds.*—An agreement between two prospectors to look for lodes and locate and hold equally whatever either of them might find is not within the statute of frauds. *Raymond* v. *Johnson*, 56

2. *Association with co-discoverer.*—A. and B., two prospectors, agreed that they would be equally interested in their finds during the summer. B. joins a third prospector C., and together B. and C. discover and locate a valuable claim. *Held*, that A. was entitled to one-half of the interest of B. in the claim. *Id.*

3. *Grub stake contracts* like other contracts enforcible in equity

PROSPECTING CONTRACT. *Continued.*

must be of definite character, and it must be shown that by their terms and conditions rights have become vested. *Cisna* v. *Mallory*, 227

4. *An agreement* to prospect at expense of the outfitters cannot be enlarged to cover the purchase of claims by the prospector with his own money. *Id.*

5. *A purchase in the Klondike country* was admitted by the defendant in answer to an allegation of a contract with him to prospect for claims in the Methow Mining District, Washington, "and such other places as he might deem desirable." There was two years' interval of time and the purchase was made with his own funds. *Held*, that the complainant had established no case. *Id.*

See STATUTE OF FRAUDS, 3.

PUBLIC DOMAIN.

1. *Locator's title indefinitely good.*—So long as the locator of mining lands complies with the statutory requirements and performs $100 worth of work in each year, he is entitled against all the world, subject to the paramount sovereignty of the United States, to hold and enjoy his possession, even though he never apply for, nor take out a patent. *Gillis* v. *Downey*, 253

2. *Estate of mining locator.*—Where there is a valid location of a mining claim the area becomes segregated from the public domain and the property of the locator with full power to alienate or encumber. *St. Louis Co.* v. *Montana Co.*, 575

See PATENT, 8.

QUIET TITLE.

1. *The possessory title* of the locator of a mining claim or his grantee is sufficient ownership upon which to base a bill to quiet title, regardless of the outstanding fee in the United States. *Gillis* v. *Downey*, 253

2. *Quiet title lies on possessory claim.*—A locator of a lode mining claim acquires an estate and interest in real property and is treated as the owner in fee as to every one except the United States, and has such title as will support an action to quiet title under Section 255 of the civil code. *Mt. Rosa Co.* v. *Palmer*, 696

RECEIVER.

1. *Circumstances determining the appointment.*—On a preliminary hearing for the appointment of a receiver, the questions which should be determined are whether it is probable that, on

RECEIVER. *Continued.*

the final hearing, the allegations of the bill will be made good by competent proof, and whether the character and situation of the property are such that it ought to be taken into judicial custody in the meantime, for the purpose of preserving the rights of all parties. *Kelley* v. *Boettcher*, 515

2. *Defendants solvent and holding apparent good title.*—Where defendants in a suit for the recovery of property and an accounting for profits have been in undisturbed possession for a number of years under an apparently good title, the presumptions of law are in their favor; and if they are solvent and able to respond for any injury done to the property, as well as for any profits that may be derived from it after the application is preferred, a receiver will not be appointed. *Id.*

RELATION.

1. *Verification of statutory ditch notice—Relation.*—The notice of location of a water right is fatally defective unless verified as required by statute. But an actual appropriation of the water to a beneficial use is valid without such compliance, the only effect of the statute being to give the benefit of relation back to date of posting, when such statutory notice is made and verified. *Murray* v. *Tingley*, 137

See RELOCATION, 1.

RELOCATION.

1. *Intermediate relocation—Revived title relates back.*—Where relocations have been made after the owner of the original location has failed beyond the statutory time to do the necessary assessment work, but such relocations are afterwards abandoned, and thereafter the owner of the original location performs assessment work which revives his rights, the fact of such intermediate relocations cannot aid one who subsequently attempts to relocate the same ground. *Justice Co.* v. *Barclay*, 68

2. *Extending limits under new name.*—A locator may relocate his mining claim, including additional vacant ground unclaimed by others, under a different name, and convey it by the designation of the last name. *Shoshone Co.* v. *Rutter*, 356

3. *Co-owner cannot relocate.*—One of the co-tenants of a mining claim, who, on the annual assessment work thereon not being done, relocated the same, holds it as trustee for all the co-tenants, notwithstanding Rev. St. § 2324, providing that on a failure to comply with conditions as to labor or improvements, the claim shall be "open to re-location in the same manner as if no location of the same had ever been made." *McCarthy* v. *Speed*, 615

RELOCATION. *Continued.*

4. *Burden of proof on the relocator.*—Where one relocates a mining claim on the theory that a former location by another was forfeited by failure to do the necessary amount of work thereon, the burden is on him to prove such failure in an action by the former locator to determine the right of possession. *Providence Co.* v. *Burke*, 625

5. *Implied admission of a prior location.*—A recital, in the location notice of a mining claim, that it is a relocation of another mining claim, is an implied admission of the validity of the former location. *Id.*

See DISCOVERY SHAFT, 1; END LINES, 1.

REMITTITUR—See PRACTICE, 3.

RENTS AND ROYALTIES.

1. *Facts of the case—Acquiescence not estoppel.*—By changes in the market demand for different sizes of coal, lessee was compelled to change from time to time the size in which he sold the coal and break lump into chestnut and other smaller sizes. The royalty was graded according to the sizes and the effect of these changes was to diminish the royalty. The lessor protested but continued to accept payments and gave his receipts. *Held*, that his successors in interest could not go back of settlements made by their ancestor but were not precluded from insisting on strict performance in the future. *Wright* v. *Warrior Run Co.*, 102

2. *Accepting royalties on lessee's construction* and receipting for the same, at the same time insisting that his, the lessor's construction was the correct one; does not bring the lessor under the rule that a party will be held to the interpretation placed by himself on a contract. *Id.*

3. *Market demand discarded.*—Where a lease provides for a graded royalty, based on sizes, it is to be construed as contemplating the mode of working and delivering the coal in use at the time and not as based on what might be the market demand during the life of the lease for larger or smaller sizes of coal. Mitchell, J., dissenting. *Id.*

4. *Coal consumed by lessee.*—It is the custom not to charge royalty on coal used by the lessee under his own boilers. *Id.*

5. *Royalty covenant runs with the land.*—A covenant, in a lease of oil and gas land, to give to the lessor a portion of all oil and the profits of all gas discovered on the land, is a covenant running with the land. *Stone* v. *Marshall Co.*, 594

See EXHAUSTED MINE; LEASE.

RESERVATION.

1. *Petroleum and natural gas are minerals*, within the terms of a reservation of "mines, minerals, and metals," in a conveyance of real estate. *Murray* v. *Allred*, 169

2. *Facts of the case—Land and minerals severed.*—The common predecessor in title of both complainant and defendant conveyed, in 1853, to one through whom defendant claims, reserving all "mines, minerals, and metals," in and under the land in question. Such grantee and his successors in title, down to defendant, conveyed by general warranty deeds, without any such reservation, but the dates of such subsequent deeds do not appear. Complainant acquired by purchase at judicial sale whatever title such common predecessor and his heirs possessed by virtue of such reservation. In a controversy respecting such title, it was agreed that defendant "and those under whom he claims have been in the actual, open, and notorious possession of such land, under color of title, for more than seven years, claiming adversely to the world to the extent of their title papers, which definitely identify the land intended to be conveyed." *Held*, insufficient to show seven years of adverse possession after the deed made by such first grantee to the third person forward, as the expression, "those under whom he claims," includes not only such first grantee, but his grantor as well, under whom complainant also claims. *Id.*

RIPARIAN RIGHTS.

1. *In Colorado.*—Nothing in the constitution of Colorado, or in the law relating to irrigation, modifies or changes the rule of common law that for manufacturing, mining, or mechanical purposes each riparian owner may use the waters of running streams on his own premises, allowing such waters to go down to subjacent owners in their natural channel. *Schwab* v. *Beam*, 279

SEAL—See STATUTE OF LIMITATIONS, 4.

SEVERANCE.

1. *Mineral exhausted, severed estate ceases.*—The owner of the estate in the coal severed from the surface title, is the owner not only of the coal but of the space which it occupied before removal in fee until the whole coal is exhausted after which event the estate determines and the surface owner holds the entire body of the land. *Webber* v. *Vogel*, 639

See ADVERSE POSSESSION; RESERVATION, 2.

SPECIFIC PERFORMANCE.

1. *Negotiations leading to promise of coal lease.*—Evidence considered and *held* insufficient to justify the refusal of an owner of land to perform an agreement to execute a coal lease thereon, on the ground of fraud and misrepresentation. *Oakford* v. *Hackley*, 708

2. *Fault—Measure of damages at law too uncertain.*—A valid agreement, definite, and fair and reasonable in its terms, was made for the lease of a tract of coal land, to be mined by the lessee. The lease would necessarily extend through a number of years. The quantity to be mined each year was uncertain, and payment of a royalty was to be made to the owner according to a sliding scale, varying from year to year. Owing to a known fault in the vein, but the extent of which was unknown, the total quantity of coal to be mined was very largely a matter of uncertainty. *Held*, that specific performance of the agreement would be decreed at suit of the lessee, on the ground of the inadequacy of his remedy at law for nonperformance, arising from the impossibility of determining the amount of his damages with any reasonable degree of certainty. *Id.*

STATUTE OF FRAUDS.

1. *An agreement to sell personal property* or things in action at a price not less than $200 is invalid unless the same, or some memorandum thereof, is reduced to writing and signed, or the buyer accepts and receives part of such property or the evidence of such things in action, or pay at the time part of the purchase money. *Walker* v. *Bamberger*, 470

2. *Performance complete.*—Where an option, not reduced to writing, on an option, is taken, and all its terms are complied with, the transaction will be taken out of the statute of frauds, and be regarded as valid. *Id.*

3. *An agreement to locate a mining claim* for the benefit or in trust for others, if made prior to the location, is valid, although not in writing. Such an agreement or a declaration of trust, not in writing, after its location, cannot be enforced. *Reagan* v. *McKibben*, 557

See PROSPECTING CONTRACT, 1.

STATUTE OF LIMITATIONS.

1. *Color of title.*—Under Gen. St. § 3253, providing that the purchaser of real estate under execution sale acquires all the title of the judgment debtor, and requires a certificate of sale to be given, the certificate shows color of title in the purchaser. *Nesbitt* v. *Delamars Co.*, 286

2. *The statute of limitations* does not begin to run against a

STATUTE OF LIMITATIONS. *Continued.*

stockholder of a corporation liable on unpaid stock for a tort of the corporation, until the creditor has liquidated his claim, or reduced it to judgment, and failed to make it against the corporation, unless it appears to be useless to proceed against the corporation. *Kelly* v. *Clark*, 431

3. *Must be pleaded.*—A party who wishes to rely upon the statute of limitations in a suit to determine the right of possession of a mining claim must plead it. *Hayes* v. *Lavagnino*, 485

4. *Sealed instrument.*—The statute of limitations has no application the action being upon a sealed instrument. *Ahrns* v. *Chartiers Co.*, 584

See ADVERSE POSSESSION.

STOCK.

1. *The statute prescribing no form of remedy*, a party seeking to enforce the personal liability created by the statute after his execution against the corporation has been returned nulla bona, may bring his action in equity to obtain relief against the stockholders. *Kelly* v. *Clark*, 431

2. *Value $125,000—Price $7,500,000.*—Under the constitutional provision and the statute providing for personal liability until the whole amount of stock subscribed for has been paid in and the statute allowing the issue of stock in payment for mines to the value thereof—the purchase of a mine which the stockholders knew was worth not over $125,000, and payment therefor in stock whose par value is $7,500,000, which is repurchased by the stockholders with full knowledge of the transaction at 2½ per cent. of its par value, is fraudulent as to a creditor, and the stock will be treated as unpaid to the extent of the difference between the actual value of the mine and the nominal value of the stock. *Id.*

3. *Knowledge of undervaluation.*—One accepting mining stock issued to him with knowledge that it represented a mine worth only about one and two-thirds per cent. of the total stock subscribed cannot escape liability to creditors for the unpaid balance on the ground that he did not sign the stock subscription list. *Id.*

4. *Liability for tort judgment.*—Under Comp. St. 1887, div. 5, c. 25 § 457, providing that stockholders shall be individually liable to the amount of their unpaid stock for all acts and contracts of the company until the whole amount of stock subscribed for shall have been paid in, a holder of such unpaid stock is liable for the torts of the corporation. *Id.*

See STATUTE OF LIMITATIONS, 2.

SURVEY—See LAND OFFICE; LOCATION, 4-6, 12; MISTAKE.

TENANT FOR LIFE.

1. *Things part of the land, wrongfully severed* by a tenant for life, become personalty, but belong to the owner of the next vested estate of inheritance in reversion or the remainder, not the life tenant. *Williamson* v. *Jones*, 20

2. *Injunction.*—Where there is a life tenant, and timber or other thing part of the realty going to loss, and imperative need calls for it, equity may cause it to be cut or otherwise secured for the remainder-man or reversioner. Equity has power to do so, if it do no harm to the life tenant, or he be compensated. *Id.*

See WASTE, 1, 2.

TENANTS IN COMMON.

1. *Action by one cotenant for common benefit.*—Where a complaint alleges that plaintiff and his co-owners are in possession as tenants in common, and prays that the title be quieted in him and his cotenants, the action is not for the benefit of plaintiff alone, but for himself and his cotenants. *Nesbitt* v. *Delamars Co.*, 286

2. *Location of fraction by one co-owner.*—On resurvey of a lode it was found to exceed the legal width. This left a vacant fraction. One of several interested parties located it in his own name. There was a question of fact as to whether at the time, it was done for the benefit of all. *Held*, that the facts of the case did not establish a trust or a breach of any proven contract. *Reagan* v. *McKibben*, 556

See ADVERSE CLAIM, 5; LEASE, 8; RELOCATION, 3; WASTE, 3.

TITLE BOND.

1. *Agreement to procure patent and convey.*—A bond for title to a part of a mining lode, executed before the patent has issued, for the purpose of settling a controversy pending between the owner of that lode and an adjoining owner, is not against public policy. *Montana Co.* v. *St. Louis Co.*, 218

2. *Evidence relating to the number of obligees* in a bond was properly excluded where the bond was in evidence. *Id.*

3. *Originals not under party's control.*—A sufficient foundation was laid to authorize the admission in evidence of copies of certain conveyances by showing that the originals were not within the control of the party. *Id.*

4. *Facts of the case.*—One of the defendants was the owner of a mining lode adjoining that possessed by plaintiff's predecessors in interest, and in applying for the patent caused a strip of their claim to be included in the survey of his, although plaintiff and its predecessors were and remained in possession. To compromise a

TITLE BOND. *Continued.*

lawsuit in regard thereto, such defendant agreed by bond to convey to the plaintiff's predecessors such strip, so soon as the patent was issued. Afterwards such defendant conveyed the claim to the co-defendant, who had knowledge of the agreement, and plaintiff became the owner of the other claim and all rights to the strip in controversy by mesne conveyance from the owners. *Held*, that a finding that plaintiff was the owner and entitled to a conveyance of such strip was proper. *Id.*

See PATENT, 8.

TOWN-SITE.

1. *Lode must have workable value.*—To entitle an applicant to a patent for a mining claim, as against occupants who have improved lots situated within its limits, claiming under the town-site act, it must be shown that at the time the town-site claimants acquired or purchased the lots the land was known to contain mineral of such extent and value as to justify expenditures for the purpose of extracting it. This rule applies though the town-site claimants have taken no steps to obtain title. *Bonner* v. *Meikle*, 83

See ADVERSE CLAIM, 2.

TRIAL—See EQUITY, 2.

TRUST.

1. *Sale reserving half interest in profits.*—One who conveys his interest in a mining claim to another, in consideration of the latter taking charge of the property and paying him one-half the proceeds arising from working the mine, or a sale thereof, retains no equitable interest therein. *Reagan* v. *McKibben*, 556

2. *Such sale created no trust relation* between the parties in the property itself. *Id.*

See RELOCATION, 3; TENANTS IN COMMON.

TUNNEL SITE—See EMINENT DOMAIN, 1, 2.

WASTE.

1. *It is waste in a tenant for life to take petroleum* oil from the land, for which he is liable to the reversioner or remainder-man in fee. *Williamson* v. *Jones*, 19

2. *Like unopened mines.*—A tenant for life may work open salt or oil wells or mines even to exhaustion, without account, but cannot open new ones. *Id.*

WASTE. *Continued.*

3. *Must account.*—It is waste in a tenant in common to take petroleum oil from land, for which he is liable to his co-tenants to the extent of their right in the land. *Id.*

WATER.

1. *A placer location ex vi termini imports an appropriation of all waters covered by it*, so far as such waters are necessary for working the claim, especially when the location covers both banks of the stream, and there can be no abandonment of the water as distinguished from the land or of the land as distinguished from the water. *Schwab* v. *Beam*, 279

2. *Cesser to mine no loss of water right.*—Where a patent issues for a mining claim, if the owner finds mining unprofitable, and holds the property for sale as a mill site, or for an electric power plant or some manufacturing establishment, he does not thereby lose the water right which he had as a miner. *Id.*

3. *Colorado constitution, in re water rights.*—Article 16 § 6, Const. Colo., which provides that "the right to divert unappropriated waters of any natural stream for beneficial uses shall never be denied," applies only to unappropriated waters, and not to a case where, by the location of a placer claim, the water has been appropriated. *Id.*

See APPROPRIATION; DITCH; RIPARIAN RIGHTS.

WAY—See INSTROKE; LEASE, 1, 2.

WORKINGS—See INSTROKE; LEVEL.

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